Petition

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No. 81-1272

IN THE

Supreme Court of the United States

October Term, 1981

JACK SALKIN, President, ADVANCED TEXTILES COMPANY, INC., and JACK SALKIN, President, JACK SALKIN UNIFORM COMPANY, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA and Special Agent JOSEPH A. DE LEON, Internal Revenue Service,

Respondents.

JACK SALKIN,

Petitioner,

v.

UNITED STATES OF AMERICA and Special Agent DONALD OLSEN, Internal Revenue Service,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit failed to follow its own procedures, established on this appeal, when it reversed the District Court for dismissing the Government's actions and remanded with instructions to enforce Internal Revenue Service summonses even though the Government failed to introduce any evidence at the hearing before the District Court in support of its petitions for enforcement.

2. Whether the Seventh Circuit's failure to remand the case and provide Petitioners with an opportunity to present evidence, after holding that the District Court erred as a matter of law in dismissing the actions under Rule 41(b) of the Federal Rules of Civil Procedure, violates Petitioners' due process rights.

3. Whether the Seventh Circuit violated Petitioners' right, as previously established by decisions of this Court and by other Courts of Appeals, to a hearing prior to enforcement of the summonses.

PARTIES TO THE PROCEEDINGS BELOW

The parties below are those stated in the caption with the exception of the First State Bank of Chicago. First State Bank of Chicago is a third party recordkeeper of Petitioner Salkin's records under Section 7609 of the Internal Revenue Code, 26 U.S.C. § 7609 (1976), and has no interest in the outcome of the case.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 658 F.2d 526 under the name of *United States v. Kis* and is reprinted in the Appendix to this Petition (A-1 through A-32). The findings of fact and conclusions of law of the District Court (A-36 through A-44) are not reported.

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JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 4, 1981. The order denying Petitioners' timely petition for rehearing was entered on November 17, 1981. This petition is filed within 90 days of that date. On December 8, 1981, the Court of Appeals issued an order staying its mandate to and including January 7, 1982. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

STATUTES INVOLVED

The pertinent statutes involved are Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. §7602 (1976) (A-75), Section 7604 of the Internal Revenue Code of 1954, 26 U.S.C. §7604 (1976) (A-75) and Section 7609(a) and (b) of the Internal Revenue Code of 1954, 26 U.S.C. § 7609(a) and (b) (1976) (A-76 through A-78).

STATEMENT OF THE CASE

On December 7, 1977, Special Agents of the Criminal Investigation Division of the Internal Revenue Service served two summonses pursuant to Section 7602(2) of the Internal Revenue Code upon Jack Salkin for the records of his two wholly-owned corporations, Advanced Textiles Company, Inc., and Jack Salkin Uniform Company, Inc. On May 23, 1978, another Special Agent of the Criminal Investigation Division of the Internal Revenue Service served a summons on First State Bank of Chicago for Salkin's personal banking records. Pursuant to Section 7609(b)(2) of the Internal Revenue Code, Salkin's attorneys instructed the bank not to comply with the summons.

Orders to show cause and petitions to enforce the summonses pursuant to Section 7604 of the Internal Revenue Code were served upon Salkin on December 6, 1978 and on the First State Bank of Chicago on January 2, 1979. Salkin was granted permission to intervene in the action against First State Bank of Chicago under Section 7609(b)(1) of the Internal Revenue Code. After Salkin filed responses to both petitions, the District Court allowed him to take the

depositions of those agents involved in the investigation. Because of facts learned through the depositions, amended responses to the petitions for enforcement of the summonses were filed in both cases, together with Salkin's supporting affidavits setting forth specific facts of wrongful conduct on the part of the Government.

On September 14, 1979, the Government filed a motion for summary judgment which was denied on December 6, 1979 (A-33). The District Court held that although the Government had established a prima facie case on the pleadings under *United States v. Powell*, 379 U.S. 48, 57-58 (1964), it had failed to show that there was no genuine issue of material fact as to Salkin's defense that the Internal Revenue Service was not in pursuit of a civil tax determination or collection activity (A-33, 34). Therefore, the Court concluded that it "need not consider the adequacy of the opposing materials submitted by" Salkin (A-34) at that time and set the cases for an adversary hearing on the merits.

At the hearing, the Government refused to introduce any evidence whatsoever in support of its petitions for enforcement of the summonses (A-37). The following discussion took place between the Court and Government counsel (A-37):

> THE COURT: When you say nothing further, you are not assuming that the affidavits are part of the evidence in the trial, are you?
>
> MS. WAWZENSKI: No, your Honor.
>
> THE COURT: You have no evidence for trial?
>
> MS. WAWZENSKI: That is right, your Honor.

Salkin then filed a motion for dismissal of the actions under Rule 41(b) of the Federal Rules of Civil Procedure. The motion was granted in both cases (A-39) and judgments were entered accordingly (A-44, 45).

The Government appealed and on September 4, 1981, the United States Court of Appeals for the Seventh Circuit rendered the opinion (A-1 through A-32) now sought to be reviewed. In its opinion, the Court of Appeals reviewed four cases from three districts in an effort to establish rules and

procedures "to be followed within our circuit" with regard to summons enforcement proceedings. *United States v. Kis*, 658 F.2d 526, 529 (7th Cir. 1981) (A-1 through A-32). Purportedly applying those procedures to Petitioners herein, the Court held that the District Court "erred as a matter of law in dismissing the action under Rule 41(b)" (A-29) and remanded the cases "with instructions to enter an order granting enforcement of the summonses there." (A-31). Ignoring the fact that the District Court's dismissal of the Government's petitions at the hearing obviated the necessity for Salkin to introduce evidence in support of his defenses, and in fact precluded him from doing so, the Seventh Circuit held that Salkin failed to meet his burden of disproving the Government's prima facie case on the pleadings (A-29).

Salkin filed a timely petition for rehearing, which was denied on November 17, 1981 (A-48). On December 8, 1981, the Court of Appeals, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, issued an order staying its mandate to and including January 7, 1982, in order to allow sufficient time to file this petition for a writ of certiorari (A-49, 50).

REASONS FOR GRANTING THE WRIT

The Seventh Circuit held that the District Court's utilization of the summary judgment procedure was "inappropriate" and its subsequent dismissal of the Government's actions pursuant to Rule 41(b) of the Federal Rules of Civil Procedure was inconsistent with the procedures it was establishing for summons enforcement cases and was erroneous as a matter of law. However, it was not the District Court's ruling but rather the ruling of the Seventh Circuit which was contrary to those procedures. The Government chose not to introduce its affidavits into evidence at the hearing. Under the Seventh Circuit procedures, it was required to do so. Therefore, the District Court did not err in dismissing the Government's actions. Consequently, the Seventh Circuit should be summarily reversed and the judgments of the District Circuit should be reinstated.

At the very least, instead of remanding the cases to the

District Court with instructions to enforce the summonses, the Seventh Circuit should have remanded with instructions to afford the taxpayer an opportunity to present his case. By failing to do so, the Seventh Circuit deprived Salkin of his due process rights to a hearing. In virtually identical circumstances, this Court in *Byrd v. Blue Ridge Electric Cooperative*, 356 U.S. 525 (1958), granted certiorari and exercised its supervisory powers over the lower federal courts. In *Byrd*, this Court held that when a defendant does not present his case because, under the District Court's view of the case he is not required to do so, a Court of Appeals denies the defendant "his day in court" if it subsequently reverses without remanding the case for further proceedings. Accordingly, the Seventh Circuit should be summarily reversed and the cases remanded with instructions to afford Salkin an opportunity to present his case.

Finally, the procedures adopted by the Seventh Circuit are in conflict with those of other Circuits and with repeated pronouncements by this Court that a taxpayer is entitled to an adversary hearing prior to enforcement of a summons. In addition, the inquiry which the Seventh Circuit permits in "discovery", which is limited to seven questions, is totally inadequate to learn facts indicative of several of the improper purposes articulated by this Court in *United States v. LaSalle National Bank*, 437 U.S. 298 (1978), which will bar enforcement of a summons. Moreover, the very concept of a preordained scope of inquiry is in conflict with *LaSalle* because this Court expressly stated that its list of improper purposes was not exclusive, and that future cases may reveal additional areas of summons abuse.

I. The departure of the Seventh Circuit from the accepted and usual course of judicial proceedings calls for an exercise of this Court's power of supervision.

The Seventh Circuit held that the summary judgment procedure utilized by the District Court was inappropriate in a summons enforcement proceeding on the ground that the burden which the taxpayer must meet in "resisting

enforcement is significantly more stringent than that of a party opposing a motion for summary judgment." 658 F.2d at 543 (A-29). Regardless of the correctness of this proposition,[1] it does not lead to the Court of Appeals' conclusion that:

> The district court therefore erred as a matter of law in dismissing the action under Rule 41(b). The Government had already made its *prima facie* case. The burden thus rested on the taxpayers to prove an improper use of the summons. Salkin never met that burden.

Id.

It does not lead to that conclusion because the Seventh Circuit stated that in order for a taxpayer to be entitled to a hearing,

> All the taxpayer needs to do is develop facts from which a court might *infer* a *possibility* of some wrongful conduct by the Government. He need not be able to prove that the wrongful conduct in fact exists.[2]

Id. at 540 (A-23) (emphasis in original). Thus, the Seventh Circuit's statement that Salkin did not "prove an improper use of the summons" was irrelevant under its own rules and procedures. All that Salkin was required to do at the pleading stage was raise an inference of wrongful conduct by the Government. Salkin met this burden by filing amended

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[1]The Federal Rules of Civil Procedure apply to summons enforcement actions. Fed. R. Civ. P. 81(a)(3); Upjohn Co. v. United States, ___ U.S. ___, 101 S. Ct. 677, 687 (1981). Although application of the rules may be modified by rules of the district court or by order of the court in a particular proceeding, such modifications are permitted only "so long as the rights of the party summoned are protected and an adversary hearing, if requested, is made available." Donaldson v. United States, 400 U.S. 517, 529 (1971).

[2]Contrary to the Seventh Circuit's holding that the summary judgment procedure utilized by the District Court was incorrect, the inference of possible wrongful Government conduct is not a standard that is "significantly more stringent than that of a party opposing a motion for summary judgment."

responses, supported by affidavits, inferring such conduct, (A-58 through A-74)[3] and there is not the slightest suggestion in the Court's opinion that Salkin failed to develop facts which raised this inference. Therefore, under the Seventh Circuit's own rules, Salkin was entitled to an adversary hearing.

The Court of Appeals' statement that the District Court's Rule 41(b) dismissal was erroneous because the Government had already made its prima facie case is squarely in conflict with the record in these cases. Once a taxpayer rebuts the Government's prima facie case on the pleadings, he is entitled to a hearing at which the Government is required to make its prima facie case at that time. The Seventh Circuit recognized this requirement when it stated:

> At the hearing, the Government can make its *prima facie* case through the introduction into evidence of the affidavits submitted with the petition for enforcement that began the proceedings. The Government could also present other evidence, testimonial or otherwise, to counter the specific allegations made by the taxpayer that were sufficient to warrant the holding of the hearing. The taxpayer would then be able to present his case, which would include the specific allegations made in his responsive pleading. The taxpayer would also be able to examine under oath the agents responsible for the investigation and any other witnesses he may call.

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[3]For example, the affidavits stated that Salkin's wholly-owned corporations were never audited by the IRS (A-63, 72); that in June of 1976 allegations of criminal violations by Salkin were made to the Criminal Investigation Division of the IRS by an informant (A-63, 72); that from June of 1976 until December of 1977 the Criminal Investigation Division conducted an investigation of Salkin (A-63, 72); that on December 7, 1977, Special Agents of the Criminal Investigation Division interviewed Salkin, and when after questioning, he refused to answer further, served him with two of the summonses at issue (A-63, 72); that subsequently on February 8, 1978, a Revenue Agent was retroactively assigned to the investigation (A-64, 73); that the inordinate and unexplained delays in the criminal investigation of Salkin were caused by the Criminal Investigation Division (A-64, 73); and, that the summonses in dispute were being used to gather information for a federal grand jury that was investigating Salkin's accountant (A-64, 73).

Id. at 540 (A-24). Thus, the District Court's Rule 41(b) dismissal was not erroneous because the Government expressly refused to put its affidavits into evidence or to present any evidence whatsoever. (A-37).

The Government in the instant cases made the tactical decision not to present any evidence to the District Court and as a result that court dismissed the Government's cases. Despite the fact that the District Court's dismissal of the Government's actions was in perfect compliance with the very procedure established by the Seventh Circuit on appeal, the Seventh Circuit reversed. This improper action by the Court of Appeals requires the exercise of this Court's broad power of supervision over judgments of the lower federal courts. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). As the *Munsingwear* decision stated in connection with the doctrine of res judicata but in language equally applicable to the present situation: "The case is therefore one where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself." 340 U.S. 41. Or as another Court in response to a similar situation stated: "The price of plaintiff's strategy, however, should not be paid by the Court or the defendant." *Turner v. Department of Army*, 447 F. Supp. 1207, 1211 (D.D.C. 1978), *aff'd without op.*, 593 F.2d 1372 (D.C. Cir. 1979). Here, the Government made a conscious decision to base its case solely upon its pleadings, consequently lost the case, and then convinced the Court of Appeals to relieve it of the consequences of that decision. The record in the instant cases not only requires the grant of Salkin's petition for certiorari, but also the summary reversal of the Seventh Circuit's decision with directions to reinstate the judgments of the District Court.

At the very least, the Seventh Circuit should have remanded the cases to the District Court to allow Salkin to put on his case. However, by reversing and directing enforcement of the summonses, the Seventh Circuit not only relieved the Government of the consequences of its tactical choice, it also denied Salkin his constitutional right to due process.

The Seventh Circuit stated in its opinion that the taxpayers in each of the four cases it was considering were given evidentiary hearings. 658 F.2d at 543 (A-29). However, the record shows that the "evidentiary hearing" granted Salkin consisted solely of the District Court's dismissal of the Government's petitions pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for failure to prosecute. No evidence was presented by Salkin because the Government's decision to introduce no evidence relieved him of the burden of going forward to present evidence in support of his defenses to the summonses.

The Seventh Circuit's order reversing the District Court and ordering enforcement of the summonses, thereby denying Salkin an opportunity to meet his burden of proving an improper Government purpose, is contrary to the procedure contemplated by Rule 41(b),[4] to the procedure approved by this Court and by the Seventh Circuit itself, and was violative of Salkin's due process rights. In *Byrd v. Blue Ridge Rural Electric Cooperative, supra,* this Court found error in the Court of Appeals' failure to remand after reversing the trial court's determination of a plaintiff's motion to strike an affirmative defense. The Court analogized the situation to a defendant's motion pursuant to Rule 41(b) and stated that:

> The petitioner was fully justified in that circumstance in not coming forward with proof of his own at that stage of the proceedings, for he had nothing to meet under the District Court's view of the statute. He thus cannot be penalized by the denial of his day in court to try the issue under the correct interpretation of the statute.

356 U.S. at 533 (citations ommitted).

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[4]Rule 41(b) provides in relevant part that:

> the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

The procedure of remanding to the District Court for further proceedings when the Court of Appeals reverses on an issue of law and when the defendant has had no opportunity to present evidence has been consistently applied in situations involving reversal of a Rule 41(b) motion to dismiss and other similar circumstances. 5 Moore's Federal Practice, ¶ 41.13[2] at 41-183 and n.5 (2d ed. 1981) and cases cited therein. In *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 156 (1963), this Court stated that not to remand to the District Court for further proceedings:

> would be to deny the appellees their day in court as to a disputed part of the case on which the trial court has never ruled because its view of the law evidently made such a ruling unnecessary.[5]

The Seventh Circuit's refusal to allow Salkin the same opportunity is a clear departure from the usual course of judicial proceedings and calls for the exercise of this Court's power of supervision. As illustrated by *Byrd v. Blue Ridge Rural Electric Cooperative, supra*, and the cases cited therein, this Court has traditionally granted certiorari in order to exercise its supervisory power over the Courts of Appeals to insure that due process and the administration of justice are maintained.[6] It is appropriate for the Court to do so in this instance where the Seventh Circuit has deprived Salkin of his due process right to an adversary hearing.

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[5]In the instant cases, the District Court held that the Government had not met its burden of showing that there was no genuine issue of material fact as to the issues presented and that the Government was therefore not entitled to summary judgment. The District Court stated that it "therefore need not consider the adequacy of the opposing materials submitted by respondents and intervenor." (A-34).

[6]For additional examples of the Court's exercise of its supervisory powers, see Fitzgerald v. United States Lines Co., 374 U.S. 16, 21 (1963); Elkins v. United States, 364 U.S. 206, 216 (1960); Walling v. Reuter, Inc., 321 U.S. 671, 676, 677 (1944); United States v. Hamburg-American S.S. Co., 239 U.S. 466, 477 (1916); see also Haynes v. United States 390 U.S. 85, 101 (1968); Neely v. Eby Construction Co., 386 U.S. 317, 321-22 (1967).

II. The Seventh Circuit's decision is in conflict with decisions of other circuits and with decisions of this Court.

Because of the importance of the enforcement of the internal revenue laws, and because of the conflict among the Courts of Appeals regarding the scope of Internal Revenue Service summons authority under Section 7602 of the Internal Revenue Code, this Court granted certiorari in *United States v. LaSalle National Bank*, 437 U.S. 298, 305 (1978). *LaSalle* established basic standards for the enforcement of summonses and articulated defenses which, if proven, would bar enforcement. The Court emphasized, however, that this list of defenses was by no means intended to be exclusive. *Id* at 318 n.20.

Conflict among the Courts of Appeals has subsequently developed with respect to the procedures which a court must afford a taxpayer challenging an IRS summons. The procedures established by the Seventh Circuit in the instant cases deny the taxpayer an adversary hearing unless he first files in rebuttal to the Government's petition, a responsive pleading, supported by affidavit, alleging specific facts from which an improper Government purpose could be inferred.[7] This procedure, although consistent with procedures adopted in the Third and Eighth Circuits,[8] is contrary to decisions in the Fifth Circuit.[9] Moreover, as illustrated below, the Seventh Circuit's procedures are in fundamental conflict with the decisions of this Court that a taxpayer is entitled to

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[7]As set forth above, the Seventh Circuit violated its own rule by denying Salkin an adversary hearing notwithstanding the fact that he supported his defenses with detailed and specific factual statements set forth in his affidavits.

[8]United States v. Garden State Nat'l Bank, 607 F.2d 61, 71 (3d Cir. 1979); United States v. Nat'l Bank of South Dakota, 622 F.2d 365, 367 (8th Cir. 1980).

[9]United States v. Southeast First Nat'l Bank of Miami Springs, 655 F.2d 661, 667 (5th Cir. 1981); United States v. Harris, 624 F.2d 575 (5th Cir. 1980). It should be noted that although it is not entirely clear from a recent Tenth Circuit opinion, United States v. Southern Tanks, Inc., 619 F.2d 54, 55 (10th Cir. 1980), that Circuit also appears to require that a taxpayer in a summons enforcement proceeding at least be afforded an adversary hearing.

an adversary hearing before enforcement is ordered. *E.g., Donaldson v. United States*, 400 U.S. 517, 529 (1970); *United States v. Powell*, 379 U.S. 48, 58 (1964).

In the instant cases, the Seventh Circuit relied on *United States v. Garden State National Bank*, 607 F.2d 61 (3d Cir. 1979) in support of its position. It acknowledged that it was deviating from the Fifth Circuit's approach in *United States v. Harris, supra*, which requires a hearing upon the mere allegation of Government bad faith. Nonetheless, the Seventh Circuit rejected the Fifth Circuit approach and adopted that of the Third Circuit because it believed that it "more accurately reflects Congress' concern that summons enforcement proceedings be concluded rapidly ... " 658 F.2d at 540 (A-23).

Barely a week after the Seventh Circuit's decision in the instant cases, the Fifth Circuit re-affirmed its belief that a taxpayer is entitled to an adversary hearing as long as he "puts in issue" through allegations in his response, the purpose of the summons. *United States v. Southeast First National Bank of Miami Springs*, 655 F.2d 661, 665 (5th Cir. 1981). The Fifth Circuit implicitly rejected the Seventh Circuit's over-emphasis on the need for rapid enforcement, quoting with emphasis from *Donaldson v. United States*, 400 U.S. 517 (1971):

> [I]n *Donaldson v. United States supra*, the Court stated that a summary proceeding may be utilized in a summons enforcement case "so long as the rights of the party summoned are protected and an *adversary hearing, if requested is made available.* 400 U.S. at 529 (emphasis added.)

Indeed, various Courts of Appeals have considered the desire for rapid enforcement to be relevant, not to whether a basic adversary hearing is provided but rather to the amount of discovery which should be provided. In *United States v. Harris, supra* at 880, the Fifth Circuit, again citing *Donaldson v. United States*, 400 U.S. 517 (1971), pointed out that discovery could be limited so long as "the rights of the taxpayer are protected and the adversary hearing is made available upon request." In *United States v. Southern Tanks,*

Inc., 619 F.2d 54 (10th Cir. 1980), although the court restricted discovery, an evidentiary heraring was provided.

The Seventh Circuit's procedures are defective, not only because they create a barrier to a taxpayer's right to a hearing, but also because the limited "discovery" made available by those procedures renders the barrier impenetrable. In *United States v. LaSalle National Bank, supra*, this Court articulated several examples of improper Government use of an IRS summons. These examples include the use of a summons when the investigation has a solely criminal purpose in an "institutional sense;" when there is a delay in making a recommendation for criminal prosecution to the Department of Justice after there is an institutional commitment to make the recommendation; and when the IRS is gathering information for another Government agency. *Id.* at 316-318. The discovery permitted by the Seventh Circuit in summons cases is totally inadequate to establish facts with respect to the foregoing improper uses. Perhaps the best example of this inadequacy is the last area of inquiry allowed by the Seventh Circuit concerning contacts "between the investigating agents and officials of the Department of Justice." 658 F.2d at 539 (A-22). *LaSalle* held that it was improper for the IRS to be an information gathering agency for *other departments of the Government.* However, the Seventh Circuit's decision in the present cases limits the area of inquiry to information gathering for the Department of Justice only.

Finally, the discovery procedure articulated by the Seventh Circuit is in conflict with *LaSalle* because, by limiting the areas of inquiry, it fails to recognize this Court's directive that the improper purposes set forth in *LaSalle* were "not intended to be exclusive," and that "[f]uture cases may well reveal the need to prevent other forms of agency abuse ..." 437 U.S. at 318 n. 20. The Seventh Circuit's procedures are thus in fundamental conflict with the decisions of this Court.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted and on the basis of the record below, the Seventh Circuit's decision should be summarily reversed. At the very least, the instant Petition should be

granted so that this Court may resolve the conflict among the Circuits and with prior decisions of this Court and establish fair and uniform rules of procedure in an area of law where litigation is frequent and has a substantial impact upon the rights of taxpayers.

Respectfully submitted

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Appendix

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In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1710

UNITED STATES OF AMERICA and SPECIAL AGENT GLENN J. KULAS,

Petitioners-Appellees,

v.

JOHN W. KIS, etc., et al.,

Respondents,

v.

GEORGE A. MEYERS,

Intervenor-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.
Nos. 79-C-155, et al.—John W. Reynolds, *Judge.*

Nos. 80-1996, 2164

UNITED STATES OF AMERICA and SPECIAL AGENT RICHARD E. ZAGOTTA,

Petitioners-Appellees,

v.

NELSEN STEEL & WIRE COMPANY, INC., etc., et al.,

Respondents-Appellants.

Appeals from the United States District Court for the Northern District of Illinois.
Nos. 77-C-4505, et al.—Hubert L. Will, *Judge.*

Nos. 80-1770, 80-1771, 80-1795, and 80-1796

UNITED STATES OF AMERICA and SPECIAL AGENT JOSEPH A. DELEON,

Petitioners-Appellants, Cross-Appellees,

v.

JACK SALKIN, etc., et al.,

Respondents-Appellees, Cross-Appellants,

UNITED STATES OF AMERICA and SPECIAL AGENT DONALD OLSEN,

Petitioners-Appellants,

v.

FIRST STATE BANK OF CHICAGO,

Respondent-Appellee,

and

JACK SALKIN,

Intervenor-Appellee, Cross-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 78-C-3195, et al.—Thomas R. McMillen, *Judge.*

No. 80-1869

UNITED STATES OF AMERICA and SPECIAL AGENT LEONARD H. LUPA,

Petitioners-Appellees,

v.

DONALD L. ANDERSON and HARRIET H. ANDERSON,

Respondents-Appellants.

Appeal from the United States District Court for the Southern District of Illinois.
No. 79-C-4—James L. Foreman, *Judge.*

ARGUED JANUARY 23, 1981—DECIDED SEPTEMBER 4, 1981

Before SWYGERT, *Senior Circuit Judge*, KUNZIG, *Judge** and BAUER, *Circuit Judge*.

SWYGERT, *Senior Circuit Judge*. These cases present appeals from Internal Revenue Service summons enforcement proceedings in several district courts. In three of the cases, the courts ordered enforcement of the summons. In the fourth, enforcement was denied. The wide disparity among these cases—both in the final resolution and in the treatment of subsidiary issues such as the taxpayer's right to discovery—indicates that we need to establish rules and procedures to be followed within our circuit.[1] Because these cases raise many issues in common regarding summons enforcement procedure, we treat them together in this one opinion as we consider the individual issues. We affirm the enforcement of the summonses in *United States v. Kis*, but we reverse for a limited remand the summons enforcement in *United States v. Nelsen Steel & Wire Co.* We reverse the denial of enforcement in *United States v. Salkin*, and we hold to be moot the appeal in *United States v. Anderson*.

I

The facts of these cases fit a similar pattern. The Internal Revenue Service in the course of a taxpayer investigation issues a summons for production of records to a close corporation controlled by the taxpayer or to a bank with which the taxpayer or the corporation has conducted business.[2] The taxpayer, pursuant to statutory authority,[3] instructs the recipient of the summons not to comply. The United States and the special agent conducting the investigation then institute the enforce-

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* The Honorable Robert J. Kunzig, Judge, United States Court of Claims, is sitting by designation.

[1] This opinion has been circulated pursuant to Circuit Rule 16(e) to all judges of this court in regular active service. No judge favored a rehearing *en banc*.

[2] See section 7602 of the Internal Revenue Code, 26 U.S.C. § 7602 (1976).

[3] 26 U.S.C. § 7609 (1976).

ment proceedings that are contested here.[4] Despite the similarities among these cases, we must relate the facts in each case to understand the particular issues involved.

United States v. Kis

In July 1978, the Criminal Investigation Division of the Internal Revenue Service in Milwaukee opened a formal investigation to determine the correct income tax liabilities of George A. Meyers, who had filed documents designated as "protest-type returns" for the years 1975, 1976, and 1977. Special Agent Glenn J. Kulas, who was assigned to the investigation, issued summonses to officers of several banks with whom Meyers had conducted business. Meyers, pursuant to section 7609 of the Internal Revenue Code of 1954, 26 U.S.C. § 7609 (1976), directed the officers, respondents in these cases, not to comply with the summonses, and the United States and Special Agent Kulas instituted enforcement proceedings in the Eastern District of Wisconsin on March 6, 1979.

In petitions seeking enforcement, the Government asserted that Kulas was conducting an investigation for the purpose of establishing Meyers's correct income tax liabilities for the years in question and that the testimony and information sought are necessary for that purpose; that the information sought is not in the possession of the Internal Revenue Service; and that all administrative steps required by the IRS for the issuance of summonses have been taken.[5] Following an order to show cause why the summonses should not be enforced, Meyers filed a responsive pleading that denied the assertions made in the Government's petition. He also alleged, among other things, that the investigation violated his Fifth Amendment rights and that its

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[4] 26 U.S.C. § 7604(b) (1976).

[5] These same declarations of good faith were made in the petitions that commenced all of the actions under review here. *See* the discussion, *infra*, Part IIIA, of the Government's *prima facie* case under *United States v. Powell*, 379 U.S. 48 (1964).

purpose was "to gain information so as to prosecute [him] criminally." Meyers also filed five pages of interrogatories, which the Government moved to quash.

A magistrate conducted a hearing on the petition on January 11, 1980, at which the Government presented testimony that, among other things, the investigation was in its initial stages; there were no records on which to proceed without the information requested in the summons; and that no decision had yet been reached whether to prosecute Meyers criminally. The testimony also revealed that all "protest-type returns" are not prosecuted, and that a revenue agent was assisting Kulas in the investigation. Meyers was able to cross-examine all the Government witnesses at the hearing. The magistrate found that the Government had "made a sufficient showing under *United States v. Powell*, 379 U.S. 48 (1964), and that the taxpayer [had] not met his burden under *United States v. LaSalle National Bank*, 437 U.S. 298 (1978)," since a valid civil purpose existed to the investigation and there was no institutional commitment by the IRS to prosecute Meyers as a "tax protester." The magistrate also quashed the interrogatories served by Meyers, since he had been able to ask many of the same questions at the hearing. The district court, on April 30, 1980, adopted the magistrate's findings of fact and conclusions of law and ordered the respondent bank officers to comply with the summonses. Meyers appeals from this order.

United States v. Nelsen Steel & Wire Co.

This proceeding arises from an investigation begun in June, 1976, of the tax liabilities of Nelsen Steel & Wire Co., Daniel B. Nelsen, Sr., Daniel B. Nelsen, Jr., and Clifford D. Nelsen. Although the investigation originally concerned only the years 1974 and 1975, upon advice of the IRS agent in charge, the Government expanded its scope to include 1971 to 1973.[6] On May 13, 1977, the Government issued the contested summonses, which

[6] Nelsen Steel had previously been audited for these tax years, had been assessed a deficiency which was paid, and the years had been closed. Reinspection letters were issued to the taxpayers involved in this case.

included the years 1971-1975. When the summonses were not complied with, the Government filed these enforcement actions in the Northern District of Illinois on November 30, 1977. The proceedings then followed the same course as the *Kis* case. Show cause orders were issued, and the individual taxpayers and their spouses were allowed to intervene. Instead of holding an immediate evidentiary hearing as in *Kis* and most other enforcement actions, the district court allowed the taxpayers and respondents discovery of certain documents and the ability to depose three IRS agents involved in the investigation. These depositions were completed by August, 1979. The taxpayers then requested further discovery, which the district court denied on February 28, 1980. Following briefing by both parties, the district court ordered enforcement of the summonses on June 11, 1980. Taxpayers appeal from this order.

United States v. Anderson

This investigation of the income tax liabilities of Donald L. and Harriet H. Anderson for the years 1973 to 1975 led to a recommendation in February, 1978 of a criminal prosecution, as well as the assertion of civil fraud penalties and adjustments to their tax liabilities. IRS Regional Counsel, however, rejected the recommendation and urged further investigation. The case then was reassigned to Special Agent Leonard H. Lupa, who in June, 1978, issued summonses to the Andersons to obtain handwriting and handprinting exemplars.[7] They were considered to be necessary in order to determine who had made certain entries in the taxpayers' business records for the years in question.

The Andersons refused to comply with the summonses on July 7, 1978, and the Government petitioned for enforcement in the Southern District of Illinois on February 1, 1979. After a hearing, the district court denied enforcement because, although the summonses were issued in good faith, the Government lacked the

[7] Lupa had not conducted the original investigation and was only marginally involved in the recommendation for criminal prosecution.

authority to compel the production of handwriting exemplars. While the Government's appeal from that order was pending, the United States Supreme Court held, in *United States v. Euge*, 444 U.S. 707 (1980), that handwriting exemplars could be obtained under section 7602. Following a remand by this court, the district court ordered enforcement on June 2, 1980. The district court, this court, and the Supreme Court all denied stays of enforcement of the district court's order, so the Andersons appeared before Special Agent Lupa on August 21, 1980, and complied with the summonses. The Government subsequently moved to dismiss this appeal as moot. The motion was argued along with the Andersons' appeal on the merits.

United States v. Salkin

In the course of an investigation into the income tax liabilities of Jack Salkin, summonses for various books and records were issued to him in his capacities as president of two close corporations and also to First State Bank of Chicago, with which he had conducted business. Salkin failed to comply with his summonses and intervened to prevent compliance by the bank, and the Government began enforcement proceedings in the Northern District of Illinois in December, 1978. Salkin denied the allegations in the Government's petitions, but he failed to allege any specific facts in rebuttal. He then filed notices of depositions of the special agents involved in the investigation, served a set of interrogatories on each agent, and requested production of certain documents in Government files. The district court quashed the interrogatories and the request for document production, but it permitted the depositions. On August 17, 1979, following the depositions, Salkin filed amended answers that included some facts developed through the discovery.

The Government moved for summary judgment in September and October, 1979. The district court denied these motions on December 6, 1979. The court's decision noted that while the Government had made out its *prima facie* case for enforcement as required in *Powell, supra*, summary judgment was inappropriate because Salkin had raised a genuine issue of fact regarding the

Government's purpose in pursuing the investigation at that time. Salkin had alleged that the IRS had abandoned the pursuit of a civil tax determination. The court therefore ordered an evidentiary hearing on the merits of the enforcement petitions.

At the opening of the hearing on April 1, 1980, the Government announced that it did not intend to present any further evidence, since the court had already found that it had demonstrated a *prima facie* case. The court then granted Salkin's oral motion to dismiss the actions pursuant to Rule 41(b), Federal Rules of Civil Procedure. The court ruled that the affidavits of the agents involved in the investigation were not evidence and that the Government had therefore not presented any evidence. The court dismissed the actions on the date of the hearing. The Government appeals.

II

Before we discuss the substantive issues raised in these appeals, we must first decide whether the appeal in *United States v. Anderson* has been mooted by the taxpayers' compliance with the summons to produce handwriting exemplars. The Andersons contend that the appeal is not moot for several reasons. The investigation of their tax liabilities is still continuing, and therefore the controversy between the parties is still alive. They argue that the subject of the appeal—the enforceability of the summons—is thus "capable of repetition, yet evading review,"[8] for other summonses may be issued on the basis of the same good faith representations made by the Government. The Andersons point out that continued refusal to comply with the order of the district court would have subjected them to sanctions for contempt of court, and litigants should not be required so to expose themselves to liability in order to avoid mootness.[9]

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[8] *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911); *Sosna v. Iowa*, 419 U.S. 393 (1975).

[9] *See In the Matter of the Special April 1977 Grand Jury*, 581 F.2d 589, 591 (7th Cir.), *cert. denied, sub nom. Scott v. United States*, 439 U.S. 1046 (1978).

Every court of appeals that has considered this question, however, has held that compliance with an IRS summons moots an appeal of the enforceability of the summons.[10] We agree with this line of decisions. While there may be an ongoing dispute between the IRS and the Andersons about their income tax liabilities, the particular controversy that is the subject matter of this appeal—the enforceability of the summonses for handwriting exemplars—no longer exists. The case or controversy to support the exercise of federal jurisdiction cannot be just any dispute between the parties but must concern the subject matter of the action. "Federal courts are without power to decide questions that cannot affect the rights of litigants *in the case before them.*" *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (emphasis added).

When, as in this case, the court could not grant any relief that would affect the legal rights of either party, no case or controversy exists. *See DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974). The Andersons contend that this court could grant them relief by declaring the sum-

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[10] First Circuit: *United States v. Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir. 1980); *United States v. Lyons*, 442 F.2d 1144 (1st Cir. 1971). Second Circuit: *United States v. Deak-Perara Banking Corp.*, 610 F.2d 89 (2d Cir. 1979). Third Circuit: *Vesco v. SEC*, 462 F.2d 1350 (3d Cir. 1972) (analogous SEC subpoena case). Fourth Circuit: *Kurshan v. Riley*, 484 F.2d 952 (4th Cir. 1973). Fifth Circuit: *Lawhon v. United States*, 390 F.2d 663 (5th Cir. 1968); *United States v. First State Bank of Clute*, 626 F.2d 1227 (5th Cir. 1980). Sixth Circuit: *United States v. Patmon*, 630 F.2d 458 (6th Cir. 1980). Eighth Circuit: *United States v. Olson*, 604 F.2d 29, 31 (8th Cir. 1979); *United States v. First National Bank of Sturgis, S.D.*, 587 F.2d 909, 910 (8th Cir. 1978); *Barney v. United States*, 568 F.2d 116 (8th Cir. 1978). Ninth Circuit: *SEC v. Laird*, 598 F.2d 1162 (9th Cir. 1979) (analogous SEC subpoena case).

United States v. Friedman, 532 F.2d 928 (3d Cir. 1976), the only decision to hold otherwise, is distinguishable from this case and the others cited above, because it involved a number of consolidated appeals, and respondents had not complied with all of the summonses involved. A live controversy therefore still existed between the parties as to the propriety of the summonses.

mons to be invalid and by suppressing the handwriting exemplars and any evidence obtained as a result of their submission. Such a ruling, however, would ignore the well-established rule that questions of suppression should not be considered until the time when the Government seeks to use that evidence.[11] It would be highly speculative so to rule at this stage, for there is no guarantee that the Government will ever seek to use that evidence. It may never even bring any subsequent actions against the Andersons. As the First Circuit noted in a similar case,

> The mere possibility of future criminal proceedings does not in itself justify present appellate consideration of the propriety of the summons. At this purely investigative stage, which may lead to civil proceedings or no proceedings at all, to quash the summons would be to prescribe amputation to forestall possible infection.

United States v. Lyons, 442 F.2d 1144, 1145 (1st Cir. 1971). If the Government does decide to prosecute the Andersons either in a civil or criminal proceeding, they may challenge the introduction of that evidence at that time, but there is no need, nor would it be proper, to decide that question now.[12]

Similarly, this case does not fit under the "capable of repetition, yet evading review" exception to the mootness doctrine. This exception is used only when it is certain that the same situation will recur.[13] It is possible that

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[11] *See, e.g., G. M. Leasing Corp. v. United States*, 429 U.S. 338, 359 (1977); *Donaldson v. United States*, 400 U.S. 517, 531 (1971); *United States v. Blue*, 384 U.S. 251 (1966).

[12] *See Donaldson supra*, p. 531 ("to the extent [he] may claim an abuse of process, [he] may always assert . . . that claim in due course at its proper place in any subsequent trial."). *See also* Duke, "Prosecutions for Attempts to Evade Income Tax," 76 Yale L.J. 1, 62 (1966).

[13] *See, e.g., Sosna v. Iowa, supra* (other persons will be adversely affected by one-year residence requirement in Iowa divorce statute); *Gannett v. DePasquale*, 443 U.S. 368 (1979) (sufficient likelihood that newspaper will again be enjoined from publishing aspects of criminal proceeding).

the Government may issue additional summonses to the Andersons based on the same representations made to support the issuance of these summonses, but we cannot assume that the Government will do so. To decide the issue now because of possible future summonses would be pure speculation on our part.

It is simply not correct, as the Andersons assert, that parties may not be compelled to choose between compliance with a court order and risking a contempt citation.[14] That is a choice that litigants are forced to make every day. Incurring a contempt citation may in many circumstances be the only means of gaining review when a question would otherwise become moot. The Supreme Court explicitly so recognized in *United States v. Ryan*, 402 U.S. 530, 533 (1971), in which it held that interlocutory review of the propriety of a grand jury subpoena would be unavailable when the respondent could "refuse compliance and . . . obtain full review of his claims" as a defense to a contempt citation. The Court noted, "We have consistently held that the necessity for expedition in the administration of criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal." *Id.*[15] These principles are not limited to the criminal field. Interlocutory review of subpoenas issued for discovery under Fed.R.Civ.P. 45 may also be obtained only as a defense to a contempt citation.[16]

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[14] *See United States v. Arthur Andersen & Co., supra*, pp. 723-24.

[15] *See, e.g., Cobbledick v. United States*, 309 U.S. 323 (1940); *Alexander v. United States*, 201 U.S. 117 (1906).

[16] *Ryan v. Commissioner*, 517 F.2d 13, 18-20 (7th Cir.), *cert. denied*, 423 U.S. 892 (1975); *Grinnell Corp. v. Hackett*, 519 F.2d 595, 596-98 (1st Cir.), *cert. denied sub nom. Chamber of Commerce v. United Steel Workers of America*, 423 U.S. 1033 (1975); Wright & Miller, *Federal Practice & Procedure* § 2463 (1971).

Nothing in *In re Special April 1977 Grand Jury*, 581 F.2d 589 (7th Cir.), *cert. denied*, 439 U.S. 1046 (1979), requires a holding to the contrary. That decision permitted a post-compliance appeal of an order enforcing grand jury subpoenas, but it is distinguishable in one significant respect.[17] In that case, the subpoenas were directed at members of the staff of appellant former Illinois Attorney General William Scott, not to Scott himself. It would have been unreasonable to require those staff members, who had no personal interest in resisting the subpoenas, to expose themselves to contempt by refusing to comply. That same logic compelled the Supreme Court, in *Perlman v. United States*, 247 U.S. 7, 12-13 (1918), to allow immediate review of an order directing a third party to produce exhibits, "for the custodian could hardly have been expected to risk a citation for contempt in order to secure [appellant] an opportunity for judicial review." In the present case, the Andersons certainly had a strong personal interest in the summons. It was their decision to comply rather than risk a contempt citation, and they cannot complain of the consequences now.[18]

This court's recent decision in *Marshall v. Milwaukee Boiler Mfg. Co., Inc.*, 626 F.2d 1339 (7th Cir. 1980), is also distinguishable from the present case. The *Milwaukee Boiler* decision was based upon the particular nature of the Occupational Safety and Health

[17] Besides the difference in the nature of the personal interests involved in *Grand Jury* and in this case, as discussed in the text above, *Grand Jury* is also distinguishable because it was based upon two decisions that involved prior restraints on speech. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). Courts are quite correctly more wary of forcing litigants to choose between compliance and contempt in a First Amendment context, for the chilling effect of any such dilemma is considerable.

[18] We note that, while no stays have been entered in any of the other three appeals on review here, none of the affected parties have complied with the summons enforcement orders. They have, apparently, been willing to risk the consequences of noncompliance.

Act, which was the focus of the controversy there. In that case, appellants sought suppression of the results of an inspection that they had permitted only after the district court had cited them for contempt. This court noted that under the penalty provisions of the Act, the penalties grew more substantial for each repeated violation. Any citation for a violation by OSHA that was based upon an illegitimate inspection would therefore have serious collateral consequences.[19] In the present case, on the other hand, if the Andersons' summonses were improper, no collateral consequences exist that could not be remedied by a timely-filed suppression motion.

Because we find that the appeal in *United States v. Anderson* is moot, we remand that case to the district court with instructions that that court vacate its summons enforcement order.[20] This procedure will permit the Andersons to move to suppress the handwriting exemplars and any evidence derived therefrom if and when the Government seeks to use that evidence. That will be the proper time for a court to consider the issues raised in this appeal.[21]

III

The taxpayers in these actions raise many same issues on appeal. They all challenge the sufficiency of the *prima facie* case presented by the Government and contend that the Government did not meet the standards established by the Supreme Court in *United States v. Powell*, 379 U.S. 48 (1964). They further argue that even

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[19] We note also that neither party in *Milwaukee Boiler* argued that the case was moot.

[20] *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *County of Los Angeles v. Davis*, 440 U.S. 625, 634 (1979). *See also United States v. Olson*, 604 F.2d 29 (8th Cir. 1979). Because of our resolution of *United States v. Anderson*, our subsequent discussion of the issues in summons enforcement proceedings will concern only the three other cases on appeal.

[21] *Cf. United States v. Friedman*, 532 F.2d 928, 931 (3d Cir. 1976).

if the Government did meet its burden, they have presented enough evidence, for example, of an institutional purpose to prosecute them criminally to rebut effectively the *prima facie* case under the tests enunciated in *United States v. LaSalle National Bank*, 437 U.S. 298 (1978). The taxpayers also challenge the varying limitations on discovery imposed by the district courts in each of the actions. Some of the cases present issues that appeared in their cases alone; for example, appellants in the *Nelsen Steel* case challenge the decision to reopen the previously audited tax years. We shall treat all of these issues in the order in which they will occur in an ordinary IRS summons enforcement case: first, the Government's responsibility to prove a *prima facie* case, and then the taxpayer's burden to rebut the Government's showing of good faith.

In discussing the relative burdens of the parties in summons enforcement actions, we cannot stress too emphatically that these proceedings are intended to be summary in nature. They occur, after all, at only the investigative stage of any action against a taxpayer, and no guilt or liability on the part of the taxpayer is established. The sole reason for the proceedings—and for permitting the taxpayer to intervene under section 7609—is to ensure that the IRS has issued the summons for proper investigatory purposes under section 7602 and not for some illegitimate purpose (such as, for example, using a civil summons to gather evidence to be used solely in a criminal prosecution).[22]

For these reasons, the burden on the taxpayer to prove Government wrongdoing is significantly greater than that on the Government to show its legitimate purposes.[23] The action should be concluded quickly, so that the investigation may advance toward the ultimate determination of civil or criminal liability, if any. The extreme length of the actions now on appeal—none are

[22] *United States v. LaSalle National Bank*, 437 U.S. 298, 316 (1978) ("The purpose of the good faith inquiry is to determine whether the agency is honestly pursuing the goals of § 7602 by issuing the summons.").

[23] *Id.*

less than two years old, and the *Nelsen Steel* case has dragged on nearly four years—demonstrates that these purposes are not being met. Considering the extraordinarily heavy burden that the Supreme Court has placed on taxpayers resisting enforcement, there is no reason for cases like these to endure for so long. Indeed, section 7609(h)(2) requires that these actions be concluded as quickly as possible. That section provides,

> Except as to cases of greater importance, a proceeding brought for the enforcement of any summons, . . . and appeals, take precedence on the docket over all cases and shall be assigned for hearing and decided at the earliest practicable date.

26 U.S.C. § 7609(h)(2) (1976). In order to meet this statutory prescription and to end the unnecessary delays that have burdened the enforcement powers of the IRS, it is clear that we must use our supervisory powers to mandate, in addition to the establishment of specific standards to be applied, a specific timetable for the resolution of these actions.[24]

A.

Summons enforcement proceedings begin when the Government files a petition for enforcement, pursuant to 26 U.S.C. § 7604. Along with the petition, the Government must submit evidence of a *prima facie* case that the conditions exist for the issuance of a summons. If the Government meets that burden, the district court should within fifteen days[25] issue an order to the respondent to show cause why the summons should not be enforced.

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[24] The Supreme Court has tried to expedite these proceedings as well. *LaSalle National Bank, supra*, p. 316. *See United States v. Harris*, 628 F.2d 875 (5th Cir. 1980).

[25] This timetable, as all others in this opinion, is hereby established in accordance with our supervisory powers. This deadline should give the district court adequate time to consider the merits of the Government's petition, for it need not look any further than the face of the petition and of the supporting affidavits. Orders to show cause were issued in all four of the cases on appeal well within this time period.

United States v. Powell, *supra*, established the elements of the *prima facie* case that the Government must present. The burden is a slight one, for the statute must be read broadly in order to ensure that the enforcement powers of the IRS are not unduly restricted.[26] In order to gain the issuance of a show cause order, the Service does not need to meet any standard of probable cause, even if the three-year statute of limitations on ordinary tax liabilities has expired. It must show only

> [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the Commissioner's possession, and [4] that the administrative steps required by the Code have been followed—in particular, that the "Secretary or his delegate," after investigation, has determined the further examination to be necessary and has notified the taxpayer in writing to that effect.

Powell, *supra*, pp. 57-58.[27] The Government ordinarily proves these four elements by affidavits of the agents involved in the investigation. No more than that is necessary to make the *prima facie* case.[28]

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[26] *United States v. Euge*, 444 U.S. 707, 711 (1980); *United States v. Kendrick*, 518 F.2d 842, 849 (7th Cir.), *cert. denied*, 423 U.S. 1016 (1975).

[27] The last three of these elements—relevance, possession, and satisfaction of the administrative process—are self-explanatory and need no further enlightenment here. The existence and definition of a "legitimate purpose" is more complex; it is explained in our discussion of the taxpayer's burden of proof, *infra*, Part IVB.

[28] Affidavits are often the only supporting evidence for the issuance of a search or arrest warrant, which, as noted above, requires a higher standard of proof. Affidavits alone should therefore certainly be sufficient to prove a *prima facie* case in summons enforcement proceedings.

B.

In *United States v. Kis* and *United States v. Salkin*, the Government met its burden of proof by providing affidavits attesting that the summoned materials were relevant to its investigations and not in its possession, that the administrative requirements had been satisfied, and that the investigations had a legitimate civil purpose of ascertaining the correct tax liabilities of the taxpayers for the years in dispute. Any contentions by the taxpayers to the contrary are without merit. As *Powell* made clear, the Service does not need to provide any more evidence at this initial stage of the proceedings. Both taxpayers, Meyers and Salkin, as well as those in *United States v. Nelsen Steel*, also raise questions concerning the institutional purpose of the IRS with respect to the commencement of criminal prosecutions. These questions must be considered by the court in the rebuttal stage of the proceedings, not in these initial stages, for the burden is on the taxpayer to disprove the Government's possession of a valid civil purpose. *LaSalle National Bank, supra*, p. 316. The assertions by affidavit of a valid civil purpose are adequate to show a *prima facie* case that would support the issuance of a show cause order.

The taxpayers in *Nelsen Steel* contend that the Government did not demonstrate that the summoned material in that case was relevant to the IRS investigation. They argue that the tax records of their spouses are not relevant to their own tax liabilities, and they challenge the relevance of the corporate records of D. Nelsen & Co., whose tax liabilities are not under investigation. While district courts must take "seriously their obligation to apply . . . [the relevance] standard to fit particular situations, either by refusing enforcement or narrowing the scope of the summons," *United States v. Bisceglia*, 420 U.S. 141, 146 (1975), the threshold of relevance is a low one. Section 7602, which authorizes a summons for "any books, papers, records, or other data which *may be* relevant . . . to such inquiry" (emphasis added), gives the IRS broad summons power, similar to

the inquisitorial power of a grand jury.[29] The Government therefore need show only that the inspection of the desired records "might throw light" upon the correctness of the taxpayer's return and liabilities. *United States v. Turner*, 480 F.2d 272, 279 (7th Cir. 1973).[30] The Government met that burden in *Nelsen Steel* through the affidavit of the special agent in charge, who attested that the requested materials were relevant.[31] Moreover, as the district court correctly found, the description of the items indicated their relevance.

Taxpayers in *Nelsen Steel* also challenged the adequacy of the Government's showing that the documents sought are not already in its possession. The Government admits that the affidavits of the agents submitted with the petitions for enforcement did not cover this point. As light as the burden is on the Government to prove its *prima facie* case in this regard, it must meet that burden. It has not done so in this case. An assertion by an agent during a deposition that he only has access to copies of some of the documents sought is not sufficient to make out a *prima facie* case.[32] We therefore remand

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[29] *United States v. Kendrick*, *supra*; *United States v. Turner*, 480 F.2d 272, 278-79 (7th Cir. 1973); *United States v. Joyce*, 498 F.2d 592, 594 (7th Cir. 1974).

[30] *See also United States v. City National Bank & Trust Co.*, 642 F.2d 388 (10th Cir. 1981) (summoned materials are relevant if a "realistic expectation" exists that the materials will illuminate the accuracy of a tax return); *United States v. Noall*, 587 F.2d 123, 125 (2d Cir. 1978), *cert. denied*, 441 U.S. 923 (1979) ("Congress acted advisedly in using the verb 'may be' rather than 'is' since the Commissioner cannot be certain the documents are relevant or material until he sees them.").

[31] *See United States v. Moon*, 616 F.2d 1043, 1046 (8th Cir. 1980); *United States v. Garden State National Bank*, 607 F.2d 61, 68 (3d Cir. 1979).

[32] The Government also seeks to prove it does not have possession of the documents through a "judicial admission" by taxpayers. In the taxpayers' memorandum in support of their motion for a stay pending appeal, they declared they would be irreparably injured if they were forced to turn over the sum-

(Footnote continued on following page)

Nelsen Steel for the limited purpose of hearing evidence, by affidavit or otherwise, concerning the Government's possession of the summoned materials.[33] *See United States v. Marine Midland Bank of New York*, 585 F.2d 36, 38-39 (2d Cir. 1978).

The *Nelsen Steel* taxpayers further contend that the summons should not have been enforced with respect to retained copies of Forms 1099, which are filed with the IRS. These forms reflect various types of non-wage income paid to the taxpayer, such as interest income paid by a bank or investment dividends. They are filed with the IRS by the individual or institution that is the source of the payments, not by the taxpayer, and the IRS files them in the same manner. They are not cross-indexed by the taxpayer's name, so they are "as a practical matter, neither accessible to nor available to [the] IRS." *United States v. First National Bank of New Jersey*, 616 F.2d 668, 674 (3d Cir.), *cert. denied, sub nom. Levey v. United States*, 447 U.S. 905 (1980). We hold that the information contained therein is not therefore already within the Government's possession for purposes of a *prima facie* case under *Powell*.[34] As the Third Circuit stated in

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[32] *continued*

moned documents. The Government contends that there could be no irreparable injury if the IRS already had possession of them. While this argument is ingenious, it cannot make up for the Government's failure to prove its own *prima facie* case.

[33] For the sake of judicial economy, we remand this case for that limited purpose only, and we will consider all the other issues raised in this appeal. If the district court finds the Government is not already in possession of the documents sought, the court should order enforcement of the summonses.

[34] This court has never explicitly so held, but it required the same result in *United States v. Turner*, *supra*, in which the court ordered enforcement of a summons for names of the persons for whom a particular preparer had prepared income tax returns, even though the returns were in the possession of the IRS and signed by the preparer. The court noted, *id.*, p. 274, that the special agent involved had testified that retrieval of the returns based upon the preparer's signature would be all but impossible. *See also Donaldson v. United States*, *supra*, p.

(Footnote continued on following page)

reaching the same result in that case, "The purpose of *Powell* . . . is a desire to prevent abuse of the administrative summons process and harassment of the taxpayer." *Id.*[35] When information is not otherwise available, as here, there is no such abuse or harassment in requiring the taxpayer to produce his own copies of the Forms 1099, which are more easily located than the Government's copies.

IV

The taxpayer will have thirty days to make his response after the district court has issued its show cause order. The burdens of production and of proof shift at that time to the taxpayer, and the Supreme Court established that the burden is "a heavy one." *LaSalle National Bank, supra*, p. 316. The taxpayer must "establish any defenses or . . . prove that enforcement would constitute an abuse of the court's process." *United States v. Genser*, 582 F.2d 292, 302 (3d Cir. 1979) (*Genser I*).[36] He must "prove a lack of good faith, that the government has abandoned in the institutional sense its pursuit of possible civil penalties." *United States v. Moll*, 602 F.2d 134, 138 (7th Cir. 1979). The taxpayer

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[34] *continued*

519, in which the Supreme Court ordered enforcement of a summons that included Forms 1099 that presumably suffered the same problems as exist here.

[35] In *United States v. Bank of California*, 80-2 U.S.T.C. ¶ 9837 (9th Cir. 1980), the Ninth Circuit affirmed a district court's holding that the IRS had not shown that Forms 1099 were not in the Commissioner's possession. This case is distinguishable on its facts from the present case, for it was based upon two factors that do not exist here: (1) The Government had not raised the contention in the district court; and (2) the affidavit of the IRS agent said the information was not in *her* possession, not that it was not in the possession of the IRS.

[36] "Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *United States v. Powell, supra*, p. 58.

must do more than just produce evidence that would call into question the Government's *prima facie* case. The burden of proof in these contested areas rests squarely on the taxpayer. As the Third Circuit observed, "*LaSalle* may not have closed the door in the taxpayer's face, but neither did it leave much more than a very slight opening." *United States v. Garden State National Bank*, 607 F.2d 61, 70 (3d Cir. 1979).

A.

Two circuits have discussed in great detail the taxpayer's burden at this point. The Third Circuit, in a series of cases culminating in *Garden State*, *id.*, has placed a very strict burden on the taxpayer. It requires that the taxpayer answer the Government's case through responsive pleadings, supported by affidavits, that allege *specific facts* in rebuttal. Those facts must permit at least an inference that some wrongful conduct by the Government exists.[37] Mere allegations of bad faith will not suffice;[38] nor will legal conclusions or memoranda of law. Any uncontested allegations of the Government's must be accepted as admitted. "Moreover, if at this stage the taxpayer cannot refute the government's *prima facie Powell* showing or cannot factually support a proper affirmative defense, the district court should dispose of the proceeding on the papers before it and without an evidentiary hearing." *Id.*, p. 71.[39]

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[37] The court cites two hypothetical examples of such conduct: (1) "that a summons was issued at the request of the Justice Department," or (2) "that formal recommendations for prosecution were being delayed until a summons could be issued and enforced, solely to further a criminal prosecution." *Garden State National Bank*, *supra*, p. 71. *See also LaSalle*, *supra*, p. 317, and *United States v. Genser*, 595 F.2d 146, 150 (3d Cir. 1979) (*Genser II*).

[38] *United States v. National State Bank*, 454 F.2d 1249, 1252 (7th Cir. 1972).

[39] *See also United States v. McCarthy*, 514 F.2d 368, 373 (3d Cir. 1975). *Powell* refers to "the adversary hearing to which the taxpayer is entitled before enforcement is ordered." *Id.*, p.

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The Third Circuit permits a limited amount of preliminary discovery in order to assist the taxpayer in meeting this burden. He may discover:

> [1] the identities of the investigating agents,
> [2] the date the investigation began,
> [3] the dates the agent or agents filed reports recommending prosecution,
> [4] the date the district chief of the Intelligence Division or Criminal Investigation Division reviewed the recommendation,
> [5] the date the Office of Regional Counsel referred the matter for prosecution,
> [6] the dates of all summonses issued under 26 U.S.C. § 7602, [and]
> [7] the nature of any contacts, relating to and during the investigation, between the investigating agents and officials of the Department of Justice.

Id., quoting *United States v. Genser*, 595 F.2d 146, 152 (3d Cir. 1979) (*Genser II*). Quoting *Genser II* further, the court goes on to say, "If the taxpayer's evidence reveals: '(1) that the IRS issued summonses after the investigating agents recommended prosecution, (2) that inordinate and unexplained delays in the investigation transpired, or (3) that the investigating agents were in contact with the Department of Justice,' the district court must then permit further investigation." *Id.*

The Fifth Circuit, in *United States v. Harris*, 628 F.2d 875 (5th Cir. 1980), adopts a slightly more lenient approach towards the taxpayer's burden. While it agrees that the taxpayer's right to an adversary hearing is not absolute, it permits the taxpayer to gain such a hearing through the mere allegation of bad faith on the part of

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[39] *continued*

58. *See also Reisman v. Caplin*, 375 U.S. 440, 449 (1964). This hearing is not, however, automatic. While courts may have disagreed on the appropriate standard, they have agreed that the taxpayer must make some threshold showing to be entitled to the hearing.

the Government. *Id.*, p. 879.[40] Although it adds that it prefers the specific allegation of supporting facts, it does not require such specifics since the taxpayer is not always entitled to discovery before the hearing. The court reasons, "The taxpayer might be placed in the unfair dilemma of having to provide supporting facts, but having no way to obtain those facts." *Id.*, p. 880, n.6.

We agree with the approach of the Third Circuit, for it more accurately reflects Congress's concern that summons enforcement proceedings be concluded rapidly, while at the same time the taxpayer is protected from summonses that may be an abuse of process.[41] Although we agree with the Fifth Circuit that we do not want to put the taxpayer in the anomalous position of having to allege specific facts when he has no means to gather that information through discovery, the basic discovery that the Third Circuit allowed in *Garden State* solves that dilemma.[42] All the taxpayer needs to do is develop facts from which a court might *infer* a *possibility* of some wrongful conduct by the Government. He need not be able to prove that the wrongful conduct in fact exists. This inference could be drawn from any of the factors cited in *Garden State* or by any other evidence that the taxpayer might have, such as an offer to settle a

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[40] *See also United States v. Wright Motor Co., Inc.*, 536 F.2d 1090, 1094 (5th Cir. 1976); *United States v. Newman*, 441 F.2d 165, 169 (5th Cir. 1971); *United States v. Roundtree*, 420 F.2d 845, 852 (5th Cir. 1970).

[41] It also is more in keeping with the tenor of previous decisions in this circuit. *See United States v. Moll*, 602 F.2d 134 (7th Cir. 1979); *United States v. Kendrick*, *supra*; *United States v. Joyce*, *supra*; *United States v. Turner*, *supra*; *United States v. Interstate Tool & Engineering Corp.*, 526 F.2d 59 (7th Cir. 1975); *United States v. National State Bank*, *supra*.

[42] The taxpayer should be able to conduct the basic discovery we permit within the thirty days he has to file his responsive pleadings. If he is unable to do so because of delay by the Government, the district court may extend his time for filing the response. The district court should view with extreme caution any other excuse given by the taxpayer for failure to conduct the discovery.

collateral dispute. If the taxpayer cannot develop even the evidence necessary to meet this standard, then an evidentiary hearing would be a waste of judicial time and resources.[43]

B.

If the taxpayer can present enough specific facts to meet this standard, he is entitled to an adversarial hearing. This hearing should be held within sixty days after the filing of his response. At the hearing, the Government can make its *prima facie* case through the introduction into evidence of the affidavits submitted with the petition for enforcement that began the proceedings. The Government could also present other evidence, testimonial or otherwise, to counter the specific allegations made by the taxpayer that were sufficient to warrant the holding of the hearing. The taxpayer would then be able to present his case, which would include the specific allegations made in his responsive pleading. The taxpayer would also be able to examine under oath the agents responsible for the investigation and any other witnesses he may call. While we do not wish to circumscribe the discretion of the district court in conducting the hearing, the court should not permit the hearing to become a pure fishing expedition by the taxpayer. The testimony he seeks should be related to some possible abuse of process as could be inferred from previously presented evidence. The court may within its discretion limit testimony if the questioning moves too far afield.

As we noted at the beginning of this section, the taxpayer bears an extraordinarily heavy burden at the hearing. He can succeed only by proving by a preponderance of the evidence some improper use of the summons by the IRS. The most common ground for challenging an IRS summons—and one that is raised in each of the cases presently on appeal—is that the IRS

[43] While *Powell* contemplates an adversarial hearing, it certainly does not require one merely to permit a fishing expedition by the taxpayer.

seeks the information in the summoned documents for use solely in a criminal prosecution. As the Third Circuit noted in *Garden State*, however, when "the IRS has *not recommended* criminal prosecution to the Justice Department and the investigating agent has *not recommended* prosecution to his superiors within the Service, the taxpayer bears an almost impossible burden to resist enforcement of the summons." *Id.*, pp. 66-67 (emphasis in original).

The Supreme Court created this heavy burden in *Donaldson v. United States*, 400 U.S. 517 (1971), and clarified it in *LaSalle National Bank, supra*. In *Donaldson*, the Court declared authoritatively, "Congress clearly authorized the use of the summons in investigating what may prove to be criminal conduct." *Id.*, p. 535. The Court refused to make the appearance of a special agent into the investigation a point of distinction between civil and criminal purposes of the investigation.[44] "To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forego either the use of the summons or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus to stultify enforcement of federal law." *Id.*, pp. 535-36. The Court repeated this determination two years later in *Couch v. United States*, 409 U.S. 322, 326 (1973), where it stated, "It is now undisputed that a special agent is authorized, pursuant to 26 U.S.C. § 7602, to issue an Internal Revenue summons in aid of a tax investigation with civil and possible criminal consequences." No other result is possible, for "Congress has created a law enforcement system in which criminal and civil elements are inherently intertwined." *LaSalle National Bank, supra*, p. 309.[45]

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[44] A special agent is one who works in the Criminal Investigation Division of the IRS, as opposed to a revenue agent, whose responsibilities are principally civil. In many investigations, a special agent and a revenue agent work together.

[45] *See United States v. Moll, supra*, p. 138 (7th Cir. 1979).

LaSalle further undercut the taxpayer's ability to resist summons enforcement. It held, among other things, that the personal intent of the agent issuing the summons is also irrelevant to the enforceability of the summons. An agent's responsibilities are rarely wholly civil or wholly criminal, and an inquiry into the agent's personal motives would both frustrate the enforcement policy of the Service and would unreasonably delay the enforcement proceedings. The proper inquiry, *LaSalle* held, is into the institutional policy of the IRS. *Id.*, p. 316. The Court created a prophylactic rule that any summons issued after the IRS has made a formal recommendation to the Justice Department to proceed with criminal prosecution shall be deemed to have been issued solely for criminal purposes, even if the Service intended to seek civil penalties as well. *Id.*, pp. 311-12.[46] Short of such a formal recommendation,[47] however, the taxpayer would bear the heavy burden "to disprove the actual existence of a valid civil tax determination or collection purpose by the Service." *Id.*, p. 316.

At the time of the summons enforcement hearing, therefore, if the IRS has not yet made a recommendation for criminal prosecution to the Justice Department, and if there is no reason to suspect that such a recommendation is being unduly delayed, "the party opposing the summons [must] establish that the inquiry has *no* civil purpose" whatsoever. *United States v. Moll*, *supra*, p. 139 (emphasis added).[48] The mere existence of

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[46] The Court recognized that even at the point of a referral the criminal and civil aspects of a tax fraud investigation do not diverge entirely, but it reasoned that such a prophylactic rule was necessary to prevent misuse of the summons process. *LaSalle National Bank*, *supra*, p. 312.

[47] The line is drawn at the time of a formal recommendation by the IRS to the Justice Department, not at the time of a recommendation for prosecution made by the special agent to his district office. The agent's recommendation could, after all, be rejected, as it was in *United States v. Anderson* here. *LaSalle National Bank*, *supra*, p. 313, n.15.

[48] *See also United States v. First National Bank of Atlanta*, 628 F.2d 871, 874 (5th Cir. 1980).

a concurrent criminal purpose is irrelevant to the decision to be made at the hearing.[49] If the taxpayer cannot prove at the hearing that the IRS has abandoned any institutional pursuit of a civil tax determination, the district court must order enforcement of the summons at that time. *Id.*, p. 138.

C.

There may be a few cases in which the district court is unable to decide, on the basis of the evidence and testimony presented at the hearing, whether the summons should be enforced or denied. Only in those particular cases should the taxpayer be permitted any additional discovery beyond that laid out in *Garden State*.[50] It is clear that the district court may limit discovery in a summons enforcement proceeding. [51] As we have discussed, some basic discovery should be permitted the taxpayer before he must make his initial response to the petition for enforcement. No discovery through depositions or interrogatories is necessary, however, between that response and the evidentiary hearing, if any, for any testimony that could be conducted then could be conducted just as easily in open court during the hearing.[52] If the court cannot decide the merits of

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[49] "It is not just an institutional commitment to recommend for prosecution that renders a summons issued under § 7602 invalid; rather, it is the absence of a civil purpose for that summons that triggers the *LaSalle* rule." *United States v. Genser*, 602 F.2d 69, 71 (3d Cir.), *cert. denied*, 444 U.S. 928 (1979) (*Genser III*).

[50] *Garden State National Bank, supra*, p. 71, n.13; *Genser I, supra*, p. 302; *United States v. McCarthy, supra*, p. 376, n.10.

[51] *United States v. Harris, supra*, p. 883; *United States v. Turner, supra*, p. 275; *United States v. Interstate Tool & Engineering Corp., supra*, p. 62; *United States v. National State Bank, supra*, p. 1252.

[52] *See* Moore's *Federal Practice*, ¶81.06[1] (2d ed. 1979) ("Since the agent can be questioned on this subject [the improper purpose defense] the use of depositions and interrogatories prior to the hearing is quite unnecessary and serves

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the enforcement petition at the hearing, then further discovery would clearly be helpful to the ultimate resolution of the case. The district court should therefore permit some discovery at this stage. The court can always limit this discovery, of course, if it is unduly burdensome.

Any discovery can be completed without a great burden on either party within sixty days after the initial evidentiary hearing. The district court should then hold a final evidentiary hearing on the petition to enforce the summons within thirty days after the completion of discovery. The burden at the final hearing would still, of course, rest upon the taxpayer, for *LaSalle* makes clear that it is his responsibility to prove that issuance of the summons would constitute an abuse of process.

V

Applying these standards to the cases before us, the summonses in the *Kis* and *Salkin* cases must be enforced. (The summonses in the *Nelsen Steel* case should also be enforced if the Government is able to prove on remand that it is not in possession of the information summoned.) As we discussed, *supra*, Part IIIB, the Government made its *prima facie* case in each of these actions (except, again, with respect to the lack of possession in the *Nelsen Steel* case). The taxpayers failed to meet their burden of either disproving the *prima facie* case or proving a valid affirmative defense. They did not meet their burden because, while they argued that the IRS had an institutional commitment to prosecute them, they never made a showing that the Service had aban-

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[52] *continued*

the sole purpose of delaying the IRS examination."). Some limited discovery of documents believed to be in the possession of the Service may be permitted before the hearing, but only if the taxpayer can make a positive showing that the particular documents are necessary to his defense and that they provide information that could not otherwise be obtained at the hearing. District courts must be wary before permitting such discovery that it is not being used as a dilatory tactic.

doned its civil purposes entirely.[53] In all of them, the IRS still sought the information summoned in order to make proper civil tax determinations, and no recommendation had yet been made to the Department of Justice that the taxpayers be prosecuted criminally; nor did the taxpayers make any showing that such a recommendation was being unduly delayed in order to gather additional evidence for the prosecution. *LaSalle* requires no more.

All of the taxpayers also contend that they were entitled to greater discovery than was allowed, but as we have seen, the district court may unquestionably limit discovery in summons enforcement proceedings. They were all given hearings at which they were able to ascertain virtually all of the information that they had sought to discover. This questioning included the basic prehearing discovery that we have permitted. *See supra*, Part IVA. The taxpayers in *Salkin* and in *Nelsen Steel* were also granted discovery in addition to the evidentiary hearing. The district courts thus gave the taxpayers more than ample opportunity to try to develop a defense that could meet the stringent standards of *LaSalle*. They were simply unable to do so.

As this opinion makes clear, the summary judgment procedure utilized by the district court in *United States v. Salkin* were entirely inappropriate to summons enforcement procedures. While these proceedings are intended to be summary in nature, the burden that must be met by a taxpayer resisting enforcement is significantly more stringent than that of a party opposing a motion for summary judgment. The district court therefore erred as a matter of law in dismissing the action under Rule 41(b). The Government had already made its *prima facie* case. The burden thus rested on the taxpayer to prove an improper use of the summons. Salkin never met that burden.

In addition, the Government was not barred from reopening the investigation into the previously closed

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[53] *See* n.49, *supra*.

tax years in its inquiry in *United States v. Nelsen Steel.* Under 26 U.S.C. § 6501(e), the ordinary three-year statute of limitations period can be extended to six years when there is a substantial understatement of income. In *United States v. Powell, supra,* p. 58, the Supreme Court specifically held that a taxpayer's burden of showing an abuse of process in a summons enforcement proceeding is not met by a mere showing that the statute of limitations for ordinary deficiencies has run. More importantly, taxpayers ought not be allowed to raise such issues in a summons enforcement proceeding. These extraneous issues tend only to delay the advancement of the action and to distract the court's attention from the primary issue that must be considered in these proceedings: whether the IRS has a legitimate purpose in issuing the summons. If the taxpayer has a claim regarding an allegedly improper reopening of an investigation, he may raise it in a separate action.[54]

VI

In summary, the procedures and requirements for summons enforcement proceedings are:

1. The Government must first prove its *prima facie* case under *Powell.* It may do so by affidavit or by other evidence at the time it files the petition for enforcement that begins these actions.

2. Within thirty days, the taxpayer must respond by alleging *specific facts* in rebuttal of the Government's *prima facie* case or in support of an affirmative defense. The taxpayer will be assisted in meeting this burden by the gathering of certain basic information through dis-

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[54] Because of our reversal of the denial of enforcement in *United States v. Salkin,* we need not consider taxpayer Salkin's claim for attorneys' fees in that case. Taxpayer Meyers's contention that enforcement of the summonses in *United States v. Kis* would violate his Fifth Amendment rights has already been answered by this court in *United States v. Turner, supra,* pp. 276-78. We have considered all other arguments raised by taxpayers in these cases, and we find them all to be without merit.

covery, as outlined in *Garden State National Bank, supra.*

3. If the taxpayer has not alleged specific facts that permit an inference of some improper purpose on the part of the Government, the district court should promptly order enforcement of the summons. If the taxpayer has met this initial burden, the district court must order a hearing on the petition within sixty days after the taxpayer's filing of his responsive pleadings. Only very limited discovery of documents and no testimonial discovery may be conducted during this time period.[55]

4. At the hearing, the burden still rests heavily on the taxpayer to prove that the summons is issued for an improper purpose or that the Government has abandoned any civil purposes to its investigation whatsoever. In most cases in which a hearing is held, the district court should be able either to order or to deny enforcement of the summons at that time.

5. In the few cases in which resolution of the issues is still unclear after the hearing, the district court should permit the taxpayer additional discovery. This discovery, which can be limited by the district court in its discretion at any time, must be concluded within sixty days after the initial evidentiary hearing. A final evidentiary hearing, at which the taxpayer still bears the burden, must then be held within thirty days after the conclusion of discovery. The district court should reach its decision on the enforcement of the summons as promptly as possible following this hearing.

We affirm the enforcement of the summonses in *United States v. Kis.* We reverse the dismissal of the action in *United States v. Salkin* and remand that case with instructions to enter an order granting enforcement of the summonses there. We remand for a limited purpose *United States v. Nelsen Steel* for proceedings consistent with this opinion.[56] Finally, we remand *United States v.*

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[55] *See* n.52, *supra.*

[56] *See* n.33, *supra.* Costs are awarded to the Government as prevailing party in all cases, except for *Nelsen Steel.* In that case, each party bears its own costs.

Anderson with instructions to vacate the order granting enforcement of the summons as being moot.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States District Court

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, *et al.*, *Petitioners,*	)	
v.	)	NO. 78 C 3195
JACK SALKIN, President, Advanced Textiles Co., Inc., and, President, Jack Salkin Uniform Co., Inc., *Respondent.*	)	& 78 C 4449

DECISION ON PETITIONERS' MOTION FOR SUMMARY JUDGMENT

We noted in our Decision of August 6, 1979 that a motion for summary judgment might be in order, to avoid further hearings in this case. Petitioners have filed such a motion, but genuine issues of material fact remain for hearing.

Petitioners' motion is supported solely by the affidavits of Joseph A. DeLeon and Robert W. Wermager. These are the same affidavits which were attached to the original petitions, which merely made out a *prima facie* case as of the dates of the affidavits. *United States v. Powell,* 379 U.S. 48, 57-58 (1964).

Appellee's Appendix V

However, a *prima facie* showing is not sufficient to meet petitioners' burden in support of a motion for summary judgment. Respondents and intervenor have asserted the defense that the Service *abandoned,* in an institutional sense, the pursuit of civil tax determination or collection. *United States v. LaSalle National Bank,* 437 U.S. 298 (1978). Petitioners' showing on that point is not sufficient, the

affidavits merely stating that "No recommendation for the criminal prosecution of the taxpayer has been made by the Internal Revenue Service to the Department of Justice" (DeLeon affidavit, par. 6). This is insufficient to even require respondents and intervenor to come forward with opposing evidence. Movants must first produce evidentiary material showing that there is no genuine issue as to the defense asserted, and they have failed to do so. See, *2361 State Corp. v. Sealy, Inc.*, 402 F.2d 370, 375 (7th Cir. 1968). We therefore need not consider the adequacy of the opposing materials submitted by respondents and intervenor.

An evidentiary hearing is required on the merits of the enforcement petitions under *Powell, supra,* and on the defenses. We will again require compliance with our final pre-trial order by January 7, 1980, in advance of trial.

However, it is appropriate now to resolve an issue raised by the parties in their briefs. There seems to be no dispute that this investigation was instigated by an informant. Respondents and intervenor contend that petitioners have wrongfully refused discovery of the allegations made by the informant and of his purposes in making them. Petitioners contend that such information is immaterial. Our decision of June 13, 1979 precluded questioning directed at disclosing the informant's identity and the information that he provided.

We reject respondents' and intervenor's argument that this information is material here in a *Powell* sense. Until recently, the formal responses to these petitions indicated no basis for an inquiry along these lines. The amended responses, filed August 17, 1979, assert that the informant had an improper purpose in making the allegations and that this improper purpose is "inextricably intertwined" with the summons. Petitioners can find no basis in the record for these conclusions, however. In the absence of good cause shown, the government's interest in protecting the informant's identity and the integrity of its investigation outweighs respondents' and intervenor's interest in exploring this

subject. Reference is directed to this court's August 6, 1979 decision in which we concluded that respondents and intervenor have learned all that they are entitled to at this stage of the proceeding. Discovery is now closed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that petitioners' motion for summary judgment is denied. The parties shall file their compliance with the final pre-trial order previously entered in these cases, no later than January 7, 1980.

ENTER:

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JUDGE, U.S. DISTRICT COURT

DATED: Dec. 6, 1979

IN THE

United States District Court

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*	)	
vs.	)	*No. 78 C 3195*
JACK SALKIN, *et al.,* *Defendant*	)	
UNITED STATES OF AMERICA, *Plaintiff,*	)	
vs.	)	*No. 78 C 4449*
FIRST STATE BANK OF CHICAGO, *Defendant.*	)	

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled causes before the HON. THOMAS R. McMILLEN, one of the Judges of said Court, in his courtroom in the United States Courthouse at Chicago, Illinois on Tuesday, April 1, 1980 at the hour of 10:00 a.m.

PRESENT:

HONORABLE THOMAS P. SULLIVAN
United States Attorney
219 South Dearborn Street, Room 1500
Chicago, Illinois 60604
BY: MS. LINDA WAWZENSKI,
Assistant United States Attorney
appeared for the Government;

MR. MICHAEL VON MANDEL
135 South LaSalle Street, Room 1211
Chicago, Illinois 60603

and

PRESENT:

MESSRS. KAMENSKY & LANDAN
120 South LaSalle Street, Suite 656
Chicago, Illinois 60603
BY: MR. MICHAEL G. ERENS,

appeared on behalf of the defendants.

THE CLERK: 78 C 3195 and 4449, Untied States vs. Jack Salkin and United States vs. First State Bank, on trial.

MS. WAWZENSKI: Good morning, your Honor, Linda Wawzenski on behalf of the United States.

MR. ERENS: Good morning, your Honor, Michael Erens on behalf of the respondent and intervenor.

MR. VON MANDEL: Michael Von Mandel on behalf of the respondent, your Honor, good morning.

MS. WAWZENSKI: Good morning, your Honor.

As we have stated before, your Honor, in pretrial conferences, the Government does not intend to go forward with any more evidence than what might be in the record at this time. Our contention is that we are entitled to enforcement on the petition in the affidavits as have been filed. And there is nothing further that we would put forward in terms of the Government's case. At this point the Government would rest.

THE COURT: When you say nothing further, you are not assuming that the affidavits are part of the evidence in the trial, are you?

MS WAWZENSKI: No, your Honor.

THE COURT: You have no evidence for trial?

MS. WAWZENSKI: That is right, your Honor.

MR. VON MANDEL: Your Honor, we have prepared a form objection to the affidavits should they be considered in any way as evidence.

THE COURT: Well, the Government is not offering them as evidence for trial. I understand they have no witnesses here, so that issue is moot.

MR. ERENS: Well, your Honor, I want to make sure that the record is clean with regard to the Government's position. As I understand it the Government is indicating that the petition, which it filed in each of the two lawsuits, which are, I guess, somehow consolidated before your Honor today, that both of those petitions have attached to them as exhibits the affidavits of various agents.

I believe that first case has the affidavit of Special Agent DeLeon, the second petition has the affidavit of Special Agent Wermager atached to it. As I understand it, what the Government is indicating is that they are offering the petition and they attached affidavits as they are in the records only as formalized pleadings, that they are not attempting to introduce the affidavits of either/or both of the agents as evidence.

THE COURT: That is what the Government said.

MS. WAWZENSKI: That is what we said, your Honor, yes.

THE COURT: It is really in effect a motion for judgment on pleadings, I suppose. But, of course, there are issues raised on the pleadings, so I cannot grant the Government a motion for judgment on the pleadings.

MR. ERENS: Your Honor, it is our position at this time that Rule 41(b) motion is in order under the Federal Rules of Civil Procedure. We have prepared one.

Your Honor, we feel that at this particular juncture as a result of the fact that the issues have been joined as a result of the filing by the respondents and intervenor of responsive pleadings together with affidavits -- that as I say, the issues have been joined and the Government has not put forth any evidence to prove its case; and, therefore, a motion for dismissal under Rule 41(b) of the Federal Rules of Civil Procedure should be allowed at this time. We have prepared one and present it to your Honor.

MR. VON MANDEL: With your Honor's permission, may we file this?

THE COURT: Yes, you can hand it up.

MS. WAWZENSKI: Your Honor, if I may respond orally to the motion, there are two points that I wish to make.

First of all, the rights of the parties to this action vested at the time that each individual summons was served, so that is the relevant period of time that we are looking at in terms of all of the issues that might rise as to the affidavits of the specific special agents.

Furthermore, it is the Government's contention that the affidavit that was filed in response to the special agents' affidavits do not raise any material issues to the affidavits as originally submitted, nor do those affidavits include anything more than conclusory statements.

It is on that basis that the Government believes that it has no purpose in going forward, that we are entitled to enforcement of each summons on the basis of the petition and affidavits as they were filed.

THE COURT: Well, the question of whether there was a genuine issue of material fact is not one that is raised in this case at this time. It was a question that was raised on the motion for summary judgment, which I denied.

I think that there was a genuine issue of material fact in the case and the government has failed to proceed, so of course, that issue must be resolved against the Government in this particular instance.

If I understand your position, then the Government has rested without presenting any evidence on trial, so I have no alternative but to grant the motion of both the respondents and the intervenors for judgment under Rule 41(b).

MR. VON MANDEL: We have one other motion, your Honor. We would request of the Court at this time an award of attorney fees in this action. There is case law supporting this. We have prepared a very simple brief motion citing one case. If your Honor would like, we can certainly prepare a more elaborate brief supporting this. We would request ten days in which to present to the Court an affidavit setting forth the amounts that have been expended by the respondent-intervenor in this action.

With the Court's permission, I would like to file this at this time.

THE COURT: Will you hand that up, please?

Do you have a copy of it?

MR. WAWZENSKI: Yes, I do, your Honor.

THE COURT: I have not seen the case that you cite, which is a Northern District of Alabama Federal Court apparently.

MR. VON MANDEL: Yes, it is, your Honor. It is a Federal Court case and it is a summons enforcement case.

THE COURT: What is the theory on attorney's fees which are awarded?

MR. VON MANDEL: Well, first, it is statutory, your Honor. Title 42 of the United States Code, Section 1988 provides for

that. I did not set out the statute in its entirety.

It is, in essence, -- it says, your Honor, that any taxpayer is a defendant or a respondent, if you will. The cases have interpreted it that way -- that the Court in its discretion may consider whether or not attorneys fees should be awarded to a taxpayer when the Government's action has been in the form of harassment, bad faith. That is more or less case interpretation of the statute.

There is a provision --

THE COURT: Section 1988 is based on a civil rights action.

MR. VON MANDEL: Yes, it is, that is correct. But there is a provision. It says, "Civil Rights and enforcement actions under the Internal Revenue Code."

THE COURT: I do not have a copy of the statute or decision. Do you have those with you here?

MR. VON MANDEL: I do not, your Honor. If I could perhaps get a copy of Title 42, I could read it into the record at this time.

THE COURT: But you do not have it here?

MR. VON MANDEL: I don't have it here, your Honor.

THE COURT: If it requires bad faith on the part of the Government, that is a little different situation than we have here.

MR. VON MANDEL: Well, that is one of the criteria, your Honor. As I say, the Courts have enumerated various criteria. Bad faith is one of them. Harassment is another. I cannot remember them all at this time.

I did not prepare a brief on this, but I would be glad to, if the Court wanted that.

MS. WAWZENSKI: Perhaps, your Honor, that would be the better route, because the Government would like an opportunity to respond, either to the one-page motion as it has been filed today or whatever more lengthy exposition of the Section 1988 statute counsel would want to file.

MR. VON MANDEL: I can keep it to a five-page brief, your Honor. I think there may be four or five relevant cases. That would be about it.

THE COURT: All right. I do not want to drag this matter out. File your brief, if you want, and I will give the Government five days in which to --

MR. VON MANDEL: Your Honor, could I request a full week? I am on trial before Judge McGarr. I do not know when that case is going to end. We are just at the end of the

plaintiff's case.

THE COURT: File it one week from today and I will let the Government file its brief one week thereafter.

MS. WAWZENSKI: Fine.

THE COURT: Unless there are some new issues raised by the Government, I see no reason for a reply memorandum.

MR. VON MANDEL: Fine, your Honor.

MR. ERENS: One additional thing, your Honor, under Rule 41(b) it says that if the Court renders judgment on the merits against the plaintiff, the Court shall make findings as provided in Rule 52(a).

Would you like us to prepare a proposal findings or --

THE COURT: No, I think the findings have already been made. The Government has simply failed to proceed to adduce any evidence on the support of its petition -- or their petitions. They have no witnesses. They have not offered the affidavits.

If they had offered the affidavits, it would not have been received, as the Governments knows. So we have nothing but the pleadings in the file. It is really a default as far as a trial is concerned.

MR. ERENS: So your Honor is satisfied that the record as it stands has the requisite findings in it for the purposes of satisfying Rule 41(b)?

THE COURT: As far as the trial is concerned, yes. I think the findings that I made and the decision on a motion for summary judgment, although not as specific, perhaps as they could have been, certainly say what the law is and that should suffice as far as the conclusions of law are concerned.

As far as the findings are concerned, I merely found against the Government because they have no evidence to support their petition.

MR. ERENS: Your Honor, may we prepare a draft order and submit it to you today?

THE COURT: I don't think you need to. I can enter a minute order finding the issues in favor of the respondents and intervenors.

MR. ERENS: Fine, your Honor.

THE COURT: I do not know what else we want to put in it.

MR. ERENS: Well, there really is nothing. Your Honor I think has stated sufficiently for the record exactly what your basis is for finding in favor of the respondents.

THE COURT: All right.

MR. ERENS: Thank you, your Honor.

MS. WAWZENSKI: Thank you, your Honor.

MR. VON MANDEL: Thank you very much for your time, your Honor.

THE COURT: We will recess until further notice.

(Which were all the proceedings had in said cause on said date.)

IN THE

United States District Court

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs. No. 78 C 3195

JACK SALKIN, *et al.*,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

vs. No. 78 C 4449

FIRST STATE BANK OF CHICAGO,
Defendant.

CERTIFICATE

I HEREBY CERTIFY that the proceedings had at the hearing of the above-entitled cause before The Honorable THOMAS R. McMILLEN, on April 1, 1980 were reported in shorthand and that the foregoing transcipt consisting of Pages 1 to 11, inclusive, is a true and correct transcript of the original shorthand notes so taken as aforesaid.

_____

Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

United States District Court

FOR THE

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL ACTION FILE NO. 78 C 3195

UNITED STATES OF AMERICA, *et al*
Petitioners

vs.

JACK SALKIN, etc., *et al*
Respondents

JUDGMENT

This action came on for trial before the Court, Honorable Thomas R. McMillen, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

It is Ordered and Adjudged respondents' and intervenors' motion for dismissal uner Rule 41(b) F.R.C.P. is granted.

Dated at Chicago, Illinois, this 1st day of April, 1980.

H. Stuart Cunningham
Clerk of Court

BY: _____
Deputy Clerk

United States District Court

FOR THE

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL ACTION FILE NO. 78 C 4449

UNITED STATES OF AMERICA, *et al*
Petitioners

vs.

FIRST STATE BANK OF CHICAGO
Respondent

JUDGMENT

This action came on for trial before the Court, Honorable Thomas R. McMillen, United States District Judge, presiding, and the issues having been truly tried and a decision having been duly rendered.

It is Ordered and Adjudged respondents' and intervenors' motion for dismissal under Rule 41(b) F.R.C.P. is granted.

Dated at Chicago, Illinois, this 1st day of April, 1980.

H. Stuart Cunningham

Clerk of Court

BY: _____

Deputy Clerk

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Opinion by Judge Swygert
JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For The Seventh Circuit
Chicago, Illinois 60604

September 4, 1981

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. ROBERT J. KUNZIG, Judge*
Hon. WILLIAM J. BAUER, Circuit Judge

No. 80-1710

UNITED STATES OF AMERICA and SPECIAL AGENT GLENN J. KULAS,
Petitioners-Appellees,
v.
JOHN W. KIS, etc., *et al.*,
Respondents,
v.
GEORGE A. MEYERS,
Intervenor-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.

Nos. 79-C-155, *et al.*
Judge John W. Reynolds

Nos. 80-1996, 2164

UNITED STATES OF AMERICA and SPECIAL AGENT RICHARD E. ZAGOTTA,
Petitioner-Appellees,
v.
NELSEN STEEL & WIRE COMPANY, INC., etc., *et al.*,
Respondents-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 77-C-4505, *et al.*
Judge Hubert L. Will

Nos. 80-1770, 80-1771, 80-1795, and

UNITED STATES OF AMERICA and SPECIAL AGENT JOSEPH A. DELEON,
Petitioners-Appellants, Cross Appellees,
v.
JACK SALKIN, etc., *et al.*,
Respondents-Appellees, Cross-Appellants,

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 78-C-3195, *et al.*

Judge Thomas R. McMillen

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*The Honorable Robert J. Kunzig, United States Court of Claims, is sitting by designation.

UNITED STATES OF AMERICA and SPECIAL AGENT DONALD OLSEN,
Petitioners-Appellants,
v.
FIRST STATE BANK OF CHICAGO,
Respondent-Appellee,

and

JACK SALKIN,
Intervenor-Appellee,
Cross-Appellant.

No. 80-1869

UNITED STATES OF AMERICA and SPECIAL AGENT LEONARD H. LUPA,
Petitioners-Appellees,
v.
DONALD L. ANDERSON and HARRIET H. ANDERSON,
Respondents-Appellants.

Appeals from the United States Court for the Southern District of Illinois, East St. Louis Division

No. 79-C-4
Judge James L. Foreman

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that: The enforcement of the summonses in *United States v. Kis* is AFFIRMED. The dismissal of the action in *United States v. Salkin* is REVERSED and the case is REMANDED with instructions. *United States v. Nelsen Steel* is REMANDED for a limited purpose. *United States v. Anderson* is REMANDED with instructions to vacate the order granting enforcement of the summons as being moot. All in accordance with the opinion of this Court filed this date.

Costs on appeal are awarded to the Government as prevailing party in all cases, except in *Nelsen Steel;* in that case each party bears its own costs on appeal; in accordance with f.n. 56 of the opinion.

United States Court of Appeals

For The Seventh Circuit
Chicago, Illinois 60604

November 17, 1981

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. ROBERT L. KUNZIG, Judge*
Hon. WILLIAM J. BAUER, Circuit Judge

UNITED STATES OF AMERICA and
JOSEPH A. DE LEON and DONALD OLSON,
Special Agents, Internal Revenue Service,
Plaintiffs-Appellants,
Cross-Appellees,
JACK SALKIN,
Intervening-Plaintiff-Appellants,
Nos. 80-1770, 80-1771,
80-1795, and 80-1796 vs.
JACK SALKIN, President of ADVANCE
TEXTILES COMPANY, INC. and
JACK SALKIN,
President of JACK SALKIN UNIFORM
COMPANY, INC.,
Defendants-Appellees,
Cross-Appellants,
FIRST STATE BANK OF CHICAGO,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 78-C-3195, 78-C-4449
Thomas R. McMillen, Judge

On consideration of the petition for rehearing filed by defendants-appellees, cross-appellants in the above-entitled cause,

IT IS ORDERED that said petition for rehearing be, and the same is hereby DENIED.

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*The Honorable Robert L. Kunzig, Judge of the United States Court of Claims, is sitting by designation.

United States Court of Appeals

For The
Seventh Circuit

December 8, 1981

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge

Nos. 80-1770, 80-1771,
80-1795 and 80-1796

UNITED STATES OF AMERICA and
SPECIAL AGENT JOSEPH A. DE LEON
Petitioners-Appellants,
Cross-Appellees,
vs.
JACK SALKIN, etc., *et al.,*
Respondents-Appellees,
Cross-Appellants,

UNITED STATES OF AMERICA and
SPECIAL AGENT DONALD OLSEN,
Petitioners-Appellants,
vs.
FIRST STATE BANK OF CHICAGO,
Respondent-Appellee,
and
JACK SALKIN,
Intervenor-Appellee,
Cross-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 78-C-3195 and 78-C-4449
Judge Thomas R. McMillen

This matter comes before the Court for its consideration upon the following document.

1. "PETITION FOR STAY OF MANDATE OF THE APPELLEES-CROSS-APPELLANTS" filed herein on November 24, 1981.

On consideration thereof,

IT IS ORDERED that the "PETITION FOR STAY OF MANDATE OF THE APPELLEES-CROSS-APPELLANTS" is hereby GRANTED and the mandates in cases Nos. 80-1770 and 80-1795 are hereby stayed to and including January 7, 1982, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure.

IT IS FURTHER ORDERED that the mandates in cases Nos. 80-1771 and 80-1796 improvidently issued on December 3, 1981 are hereby RECALLED and these mandates are also hereby stayed to and including January 7, 1982.

A-51
IN THE

United States District Court

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs. 78 C 3195

JACK SALKIN, et *al.*,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

vs. 78 C 4449

FIRST STATE BANK OF CHICAGO,
Defendant.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HONORABLE THOMAS R. McMILLEN, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Monday, March 31, 1980, at the hour of 10:00 o'clock a.m.

PRESENT:

HONORABLE THOMAS P. SULLIVAN
United States Attorney
219 South Dearborn Street, Room 1500
Chicago, Illinois 60604
BY: MS. LINDA WAWZENSKI,
Assistant United States Attorney

appeared for the Government;

APPEARANCES:

MR. MICHAEL VON MANDEL
135 South LaSalle Street, Room 1211
Chicago, Illinois 60603

and

MESSRS. KAMENSKY & LANDAN
120 South LaSalle Street, Suite 656
Chicago, Illinois 60603
BY: MR. MICHAEL G. ERENS

appeared on behalf of the Defendants.

THE CLERK: 78 C 3195 and 4449, United States vs. Jack Salkin; motion to quash trial subpoenas.

MR. VON MANDEL: Good morning, your Honor. Michael Von Mandel on behalf of the respondents.

MR.ERENS: Michael Erens on behalf of the respondents.

MS. WAWZENSKI: Linda Wawzenski on behalf of the United States, your Honor.

Your Honor, this is the government's motion to quash the 13 trial subpoenas that have been served in this case set for trial tomorrow. We have also been tendered with a response by the respondents on Friday. So, I would consider that the motion to quash is fully briefed, at least from that standpoint.

We would have no further response to make.

THE COURT: You have had a 12(d) conference?

MS. WAWZENSKI: Yes, we have, your Honor.

THE COURT: It does come as a bit of a surprise that the respondents need 13 witnesses. I thought I made it reasonably clear at the pretrial proceedings that, No. 1, there is no purpose served by calling a witness who has nothing to say on the subject, and you have taken some depositions, and, No. 2, we don't need cumulative evidence, particularly by lower-rated employees.

But certainly you are entitled to witnesses, key witnesses, who would know something about the facts of the case.

I don't understand, since we have a trial, why the government is taking the position that nobody should be subpoenaed.

Are you going to bring them in voluntarily, or what?

MS. WAWZENSKI: Your Honor, it will depend on how the ruling is on the motions to quash.

THE COURT: Well, I am not going to quash all subpoenas. They are entitled to witnesses. Unless they can get them by agreement, they have to have a subpoena.

MS. WAWZENSKI: Your Honor, those witnesses who remain subject to subpoena after your Honor has ruled as to all of them would, I would assume, appear subject to that subpoena.

THE COURT: Well, I can't tell which ones you are willing to produce voluntarily. You ask that all subpoenas, I take it, are to be quashed.

Are these the entire 13 witnesses that you plan to use?

MR. VON MANDEL: Yes, they are, your Honor.

MS. WAWZENSKI: As far as I know there is only one other witness who is not an IRS employee who will also be tendered, but the balance of the witnesses of all 13 are employees of the Service.

THE COURT: Are they all employees that can offer some evidence in behalf of the respondents' defense?

MS. WAWZENSKI: Your Honor, it depends for which purpose they are going to be put on the stand. That would be an answer that the taxpayers' attorney would have to address.

THE COURT: Well, if you don't know, I don't know how the respondents are supposed to know.

MR. VON MANDEL: Your Honor, if I may. The government has indicated that it would not produce any witnesses whether they are subpoenaed or not.

That is our understanding of the government's position.

THE COURT: I think that is right.

MR. VON MANDEL: These subpoenas, of course, for the record, are to show that we have attempted to serve them. We require them as witnesses.

My understanding is that tomorrow the government will produce no witnesses at all. We will go through some motions in a matter of a half an hour, and the case will be over.

THE COURT: It won't be over unless the government doesn't prove a prima facie basis for its subpoenas. It will be over as far as the government is concerned.

MR. VON MANDEL: That's right. If it doesn't produce any witnesses, your Honor, we don't intend to produce any witnesses, either.

THE COURT: You don't intend to produce any witnesses?

MR. VON MANDEL: The government has the burden, your Honor. They have to go forward. If they produce no witnesses to carry their part of the case, then we would not put any witnesses on.

THE COURT: Well, then, why do we need a subpoena?

MR. ERENS: Your Honor, as you are well aware, we have been through this in chambers several times in pretrial

conferences and we have discussed our position and the government's position.

As Mr. Von Mandel says, in the event everything takes shape exactly the way the government has indicated it would, we will be filing a motion under Rule 41(b) as your Honor is well aware.

Depending upon what evidence the government puts in, that will either be granted or denied. Depending upon what occurs with our Rule 41(b) motion, it will dictate as to whether or not these witnesses have to be called. Because depending upon what your Honor does, we have to go forward with the case and we are going to have to interrogate these witnesses.

So, it is really almost impossible for us to tell today unless the government will tell us exactly what they are going to do tomorrow or knowing exactly what your Honor is going to do tomorrow, to know whether or not these witnesses are going to have to testify.

There is a possibility that under certain circumstances the witnesses will not have to testify.

THE COURT: Well, the government says they are not going to offer any witnesses tomorrow.

MS. WAWZENSKI: Your Honor, I have consistently told counsel for the taxpayer that the government intends to introduce nothing at trial. We are going to rest on the case as it exists on the pleadings that have already been filed. We will produce no evidence either by witnesses or documentary.

That position has remained the same throughout the whole period we had pretrial conferences and it has not changed.

THE COURT: Aren't you even going to offer subpoenas as evidence?

MS. WAWZENSKI: No, your Honor.

THE COURT: Well, then, you just take a default if you do that.

MS. WAWZENSKI: No. We will rest on the record as it stands.

THE COURT: I know, but we haven't had a trial yet. So, there isn't any record.

MS. WAWZENSKI: The pleadings, your Honor, we will rest on the pleadings as they are in the record.

That is part of the record. We will not introduce anything additional into evidence.

THE COURT: It is not part of the record as far as the trial is concerned. You filed a motion for summary judgment, as I recall. One side or the other did.

MS. WAWZENSKI: Yes, we did, your Honor.

MR. ERENS: We both did.

THE COURT: It was denied because I thought there was a genuine issue of material fact on the respondents' affirmative defense, you might call it. But if you don't have any evidence, the record on a motion for summary judgment is already passed. It doesn't become a record on trial just because you have an affidavit attached to the motion or even depositions.

If you don't offer them you have no trial record.

Well, if you are not going to offer anything, then it sounds to me as though it is a default. On a default the respondents don't have to go forward.

MR. ERENS: That is exactly what we said, your Honor, when we discussed this in chambers. We indicated that if the government does exactly what Miss Wawzenski has indicated they will do right now here today, we will move under Rule 41(b) for a dismissal of the case.

THE COURT: But, on the other hand, if the government should make out a prima facie case tomorrow, then it would be the respondents' burden to go forward to try to show why the subpoenas should be quashed.

I don't mean the trial subpoenas, but the original subpoenas, the IRS subpoenas.

Again, I think you are entitled to government witnesses. What I was trying to ascertain is whether the government was willing to produce them voluntarily. I gather the government is willing to produce them voluntarily if it becomes appropriate at trial.

MS. WAWZENSKI: They would appear subject to subpoena, your Honor.

THE COURT: All right. Then I will deny the motion.

MR. VON MANDEL: Your Honor, there is one other problem. I am on trial right now before Judge McGarr. I have talked to him about this problem. He will hold off resumption of that trial until 11:00 o'clock on my representation to him that this matter before your Honor would take in the neighborhood of a half hour or 45 minutes to try.

Now, I made that representation on the basis of the government who represented to me that they would

produce no witnesses. So, there really won't be any time-consuming proceedings before your Honor tomorrow. As long as the government does not change its position between today and tomorow, I think that would be fine and Judge McGarr will hold off resumption until 11:00 o'clock.

THE COURT: How long is his case expected to last?

MR. VON MANDEL: Your Honor, we were on trial all last week and I think we will be on trial until about Thursday of this week before Judge McGarr.

THE COURT: Well, I will start the case at 10:00 o'clock. I won't guarantee that I will finish it, but I will certainly honor Judge McGarr's request that you be freed by 11:00 here.

MR. VON MANDEL: Thank you, your Honor.

THE COURT: Then if we have to continue the matter to a later date for some purpose or other, I will continue the subpoenas in effect. But the motion to quash is denied.

MR. VON MANDEL: Thank you, your Honor.

MS. WAWZENSKI: Thank you, your Honor.

(WHICH WERE ALL THE PROCEEDINGS HAD AND TAKEN ON THE DAY AND DATE AFORESAID IN THE ABOVE-ENTITLED CAUSE.)

IN THE

United States District Court

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*	
vs.	78 C 3195
JACK SALKIN, *et al.*, *Defendants.*	
UNITED STATES OF AMERICA, *Plaintiff,*	
vs.	78 C 4449
FIRST STATE BANK OF CHICAGO, *Defendant.*	

CERTIFICATE

I, James W. Cheek, hereby certify the foregoing is a true, accurate and complete transcript of the proceedings had in the above-entitled cause before the HONORABLE THOMAS R. McMILLEN, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on March 31, 1980.

_____

Official Court Reporter
United States District Court
Northern District of Illinois

IN THE

United States District Court

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA and SPECIAL AGENT JOSEPH A. DeLEON, INTERNAL REVENUE SERVICE, *Petitioners,*	)	
vs.	)	No. 78 C 3195
JACK SALKIN, PRESIDENT ADVANCED TEXTILES COMPANY, INC. and JACK SALKIN, PRESIDENT JACK SALKIN UNIFORM COMPANY, INC., *Respondents.*	)	

AMENDED RESPONSE TO PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

Comes now Jack Salkin, President, Advanced Textiles Company, Inc., and Jack Salkin, President, Jack Salkin Uniform Company, Inc., by his attorneys Michael von Mandel and Michael G. Erens, and for his amended response to the petition states as follows:

1. Admits that if jurisdiction exists, it exists by virture of Section 7402(b) and 7604(a) of the Internal Revenue Code of 1954.

2. Admits that Special Agent Joseph A. DeLeon is employed in the Intelligence Division of the Internal Revenue Service in Chicago, Illinois, but denies that he is authorized under Section 7602 of the Internal Revenue Code of 1954 and Section 301.7602-1 of the Treasury Regulations to issue and serve summonses under facts and circumstances such as those in the present case.

3. Admits that Jack Salkin resides within the geographical jurisdiction of this Court, but denies that he resides at 8162 North Kilpatrick, Skokie, Illinois.

4. Admits that Special Agent Joseph A. DeLeon embarked

upon an investigation of the federal income tax liabilities of Jack Salkin for the years 1973 through 1977, but denies that the investigation was conducted pursuant to a proper purpose and in good faith.

5. Admits that the investigation of Jack Salkin was transferred to Special Agent Peter A. Cunningham and then to Special Agent Robert W. Wermager, but denies that Special Agent Robert W. Wermager is currently conducting the investigation of Jack Salkin.

6. Admits that on December 7, 1977, Special Agent Joseph A. DeLeon personally served two summonses on Jack Salkin, copies of which are attached to the petition as Exhibits A-1 and A-2, but denies that such summonses were served pursuant to a proper purpose and in good faith.

7. Admits that the respondent failed to produce the documents summoned, but denies the remaining allegations contained in paragraph 7 of the petition and those contained in the affidavits attached to the petition as Exhibits B and C, unless otherwise admitted herein, and denies that Special Agent Robert W. Wermager is currently conducting the investigation of respondent.

8. Denies the allegations contained in paragraph 8 of the petition.

9. Lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 9 of the petition, because the Internal Revenue Service has steadfastly refused to produce the witness statements, affidavits and records already in its possession.

10. Denies the allegations contained in paragraph 10 of the petition.

11. Denies the allegations contained in paragraph 11 of the petition.

12. Lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 12 of the petition, because the Internal Revenue Service has steadfastly refused to produce its records and recommendations pertaining to the taxpayer.

FIRST AFFIRMATIVE DEFENSE

For his first affirmative defense respondent states that the Internal Revenue Service has no institutional purpose to

determine respondent's civil tax liability or collect currently outstanding taxes for the years summoned and that, therefore, the summonses in dispute are unenforceable.

SECOND AFFIRMATIVE DEFENSE

For his second affirmative defense respondent states that the Criminal Investigation Division of the Internal Revenue Service has not issued the summonses in dispute in good faith, that they have been issued solely for the purpose of unearthing information relating to alleged criminal violations of the Internal Revenue Code, that the material summoned is sought for the improper purpose of obtaining evidence to be used in a criminal tax prosecution and that, therefore, the summonses are unenforceable.

THIRD AFFIRMATIVE DEFENSE

For his third affirmative defense respondent states that there were inordinate and unexplained delays in the Criminal Investigation Division's investigation of the respondent when there was an institutional commitment to process the case for criminal prosecution, that the inordinate and unexplained delays were occasioned by the Internal Revenue Service which sought additional evidence for a criminal tax prosecution and that, therefore, the summonses are unenforceable.

FOURTH AFFIRMATIVE DEFENSE

For his fourth affirmative defense respondent states that the summonses in dispute are being used by the Internal Revenue Service to gather information for other government agencies and departments including the Department of Justice and the United States Attorney and that, therefore, the summonses are unenforceable.

FIFTH AFFIRMATIVE DEFENSE

For his fifth affirmative defense respondent states that the summonses in dispute seek information already in the possession, custody and control of the Internal Revenue Service and that, therefore the summonses are unenforceable.

SIXTH AFFIRMATIVE DEFENSE

For his sixth affirmative defense respondent states that the

summonses in dispute are based on allegations made by an informant, that the informant's improper purpose in making these allegations is inextricably intertwined with the summonses and that, therefore, the summonses are unenforceable.

WHEREFORE, the respondent prays that the petition be dismissed with prejudice and that judgment be entered for the respondent together with costs as authorized by law, including attorney's fees as provided by Title 42, United States Code, Section 1988, as amended.

Respectfully submitted,

Attorney for Respondent
Michael von Mandel
135 S. La Salle Street
Suite 1211
Chicago, Illinois 60603
(312) 726-2145

Of Counsel:

Michael G. Erens, Esquire
Kamensky & Landan
Suite 656
120 South La Salle Street
Chicago, Illinois 60603
(312) 368-1776

STATE OF ILLINOIS) A-62
) SS.
COUNTY OF COOK)

IN THE

United States District Court

FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA and SPECIAL AGENT JOSEPH A. DeLEON, INTERNAL REVENUE SERVICE, *Petitioners,*	)	
v.	)	No. 78 C 3195
JACK SALKIN, PRESIDENT ADVANCED TEXTILES COMPANY,INC. and JACK SALKIN, PRESIDENT JACK SALKIN UNIFORM COMPANY, INC., *Respondents.*	)	

AFFIDAVIT IN SUPPORT OF AMENDED RESPONSE TO PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

JACK SALKIN, being first duly sworn, on oath deposes and states that:

I am President of Advanced Textiles Company, Inc., and Jack Salkin Uniform Company, Inc., the respondents in the above-entitled case;

I have read the foregoing Amended Response to Petition to Enforce Internal Revenue Service Summons;

I know the contents thereof and that the responses, allegations and affirmative defenses contained therein are true to the best of my knowledge, information and belief.

Based upon my personal knowledge, information made available to me and those facts established through discovery in the above cause, I do verily believe the following to be true:

1. Since the formation of my wholly owned corporations, Advanced Textiles Company, Inc. and Jack Salkin Uniform

Company, Inc., neither I nor said corporations have ever been audited by a revenue agent of the Internal Revenue Service.

2. In June of 1976, allegations of criminal violations of the Internal Revenue Code were made against me and/or my wholly owned corporations by an undisclosed informant to the Criminal Investigation Division of the Internal Revenue Service in Chicago, Illinois.

3. The informant's allegations were not made for the purpose of causing the Internal Revenue Service to make a civil tax determination or collect any outstanding taxes.

4. During the period from June of 1976 to December of 1977, several Special Agents of the Criminal Investigation Division of the Internal Revenue Service gathered information about me to be used in a criminal tax prosecution.

5. I am unable to describe in detail the information gathered because of the failure of the special agents who were deposed in the above cause to answer certain questions and produce certain documents, but the depositions disclose that several special agents worked on the case before it was assigned to Special Agent Joseph DeLeon.

6. On or about November 1, 77, the Criminal Investigation Division's investigation of me received a docketed number.

7. On December 7, 1977, I was interviewed by Special Agent DeLeon and Special Agent Charles Accardi, who asked me several questions until I refused to answer further, at which time they served me with the two summonses involved in the present action. No revenue agent accompanied Special agents DeLeon and Accardi at that interview.

8. On December 7, 1977, Special Agents DeLeon and Accardi interviewed my accountant, Alvin Barasch, who was also served with an Internal Revenue Service summons.

9. On or about January 10, 1978, my attorney delivered to Special Agent DeLeon my personal income tax file together with the income tax files of Advanced Textiles Company, Inc. and Jack Salkin Uniform Company, Inc.

10. Subsequently, Special Agent DeLeon accompanied by another special agent interviewed my bookkeeper, Mr. Arlis Smith, and several of my customers; they obtained affidavits from several persons whose identities they will not disclose

and tape recorded the interview with Mr. Smith.

11. On February 8, 1978, Revenue Agent Kathleen O'Mullen was retroactively assigned to the investigation.

12. On May 23, 1978, Special Agent Robert W. Wermager served the summons in Civil No. 78 C 4449 on First State Bank of Chicago seeking my personal banking records. The bank was instructed not to comply with the summons.

13. At the time the summonses in dispute were served, there was no institutional purpose on the part of the Internal Revenue Service to determine my civil tax liability or collect outstanding taxes.

14. The sole function of special agents of the Internal Revenue Service is to develop a case for criminal prosecution.

15. There were inordinate and unexplained delays in the Criminal Investigation Division's investigation of me, which commenced in June of 1976 or earlier, and these delays were occasioned by special agents who were seeking additional evidence to be used in a criminal tax prosecution.

16. A federal grand jury has been impaneled and has been and is presently conducting an investigation into the accounting firm that prepared my tax returns. The summonses in dispute are being used among other things to gather information for other government agencies and departments.

17. The Criminal Investigation Division of the Internal Revenue Service has already obtained tax-related records concerning me and/or my wholly owned corporations; however, it is not clear whether the Internal Revenue Service has all of the records sought in the summonses due to its failure to produce documents and the failure of witnesses to answer certain questions propounded to them on deposition.

18. The summonses in dispute were issued based upon allegations made by an informant whose purpose in making such allegations is inextricably intertwined with the purpose of the present summonses.

_____

JACK SALKIN

SUBSCRIBED AND SWORN TO before me
this 5th day of July, 1979.

_____
NOTARY PUBLIC

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Amended Response to Petition to Enforce Internal Revenue Service Summons and Affidavit in Support thereof have been made upon the United States this day of , 1979, by mailing a true copy of same to:

Narda Cisco, Esquire
Assistant U.S. Attorney
219 South Dearborn
Chicago, Illinois 60604

_____
Michael von Mandel
135 S. La Salle Street
Suite 1211
Chicago, Illinois 60603

IN THE
United States District Court
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA and SPECIAL AGENT ROBERT W. WERMAGER INTERNAL REVENUE SERVICE, *Petitioners,* v. FIRST STATE BANK OF CHICAGO, *Respondent.*	No. 78 C 4449

AMENDED RESPONSE TO PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

Comes now Jack Salkin, Intervenor, by his attorneys Michael von Mandel and Michael G. Erens, pursuant to Section 7609(b) of the Internal Revenue Code of 1954 (26 U.S.C.) and for his amended response to the petition states as follows:

I

Admits that if jurisdiction exists, it exists by virtue of Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954.

II

Denies the allegations contained in paragraph II of the petition, in particular, that Robert W. Wermager is employed by the Internal Revenue Service and is authorized under Section 7602 of the Internal Revenue Code of 1954 and Section 301.7602-1 of the Treasury Regulations to issue and serve summonses and, in addition, avers that under the facts and circumstances of the present case the summons in dispute is unenforceable.

III

Admits the allegations contained in paragraph III of the petition.

IV

Denies the allegations contained in paragraph IV of the petition.

V

Admits that the intervenor maintained bank accounts with the respondent, but lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in paragraph V of the petition.

VI

Admits that an Internal Revenue Service summons, a copy of which is attached to the petition as Exhibit A, was served on the respondent, First State Bank of Chicago, on May 23, 1978, but denies that such summons was served pursuant to a proper purpose and in good faith.

VII

Admits the allegations contained in paragraph VII of the petition.

VIII

Admits the allegations contained in paragraph VIII of the petition.

IX

Admits that the respondent has not complied with the summons, but denies the remaining allegations contained in paragraph IX of the petition and those contained in the affidavit attached to the petition as Exhibit D not otherwise admitted herein.

X

Denies the allegations contained in paragraph X of the petition and those contained in the affidavit attached to the petition as Exhibit D not otherwise admitted herein.

XI

Lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph XI of the petition, because the Internal Revenue Service has steadfastly refused to produce the witness statements, affidavits and records already in its possession.

XII

Lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph XII of the petition, because the Internal Revenue Service has steadfastly refused to produce its records and recommendations pertaining to the taxpayer.

XIII

Denies the allegations contained in paragraph XIII of the petition.

XIV

Denies the allegations contained in paragraph XIV of the petition.

FIRST AFFIRMATIVE DEFENSE

For his first affirmative defense intervenor states that the Internal Revenue Service has no institutional purpose to determine intervenor's civil tax liability or collect currently outstanding taxes for the years summoned and that, therefore, the summons in dispute is unenforceable.

SECOND AFFIRMATIVE DEFENSE

For his second affirmative defense intervenor states that the Criminal Investigation Division of the Internal Revenue Service has not issued the summons in dispute in good faith, that it has been issued solely for the purpose of unearthing information relating to alleged criminal violations of the Internal Revenue Code, that the material summoned is sought for the improper purpose of obtaining evidence to be used in a criminal tax prosecution and that, therefore, the summons is unenforceable.

THIRD AFFIRMATIVE DEFENSE

For his third affirmative defense intervenor states that

there were inordinate and unexplained delays in the Criminal Investigation Division's investigation of the intervenor when there was an institutional commitment to process the case for criminal prosecution, that the inordinate and unexplained delays were occasioned by the Internal Revenue Service which sought additional evidence for a criminal tax prosecution and that, therefore, the summons is unenforceable.

FOURTH AFFIRMATIVE DEFENSE

For his fourth affirmative defense intervenor states that the summons in dispute is being used by the Internal Revenue Service to gather information for other government agencies and departments including the Department of Justice and the United States Attorney's office and that, therefore, the summons is unenforceable.

FIFTH AFFIRMATIVE DEFENSE

For his fifth affirmative defense intervenor states that the summons in dispute seeks information already in the possession, custody and control of the Internal Revenue Service and that, therefore, the summons is unenforceable.

SIXTH AFFIRMATIVE DEFENSE

For his sixth affirmative defense intervenor states that the summons in dispute is based on allegations made by an informant, that the informant's improper purpose in making these allegations is inextricably intertwined with the summons and that, therefore, the summons is unenforceable.

WHEREFORE, the intervenor prays that the petition be dismissed with prejudice and that judgment be entered for the intervenor together with costs as authorized by law, including attorney's fees as provided by Title 42, United States Code, Section 1988, as amended.

Respectfully submitted,

_____

Attorney for Intervenor

Michael von Mandel
Suite 1211
135 S. La Salle Street
Chicago, Illinos 60603
(312) 726-2145

OF COUNSEL:

Michael G. Erens, Esquire
Kamensky & Landan
Suite 656
120 South La Salle Street
Chicago, Illinois 60603
(312) 368-1776

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

IN THE

United States District Court

FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA and SPECIAL AGENT ROBERT W. WERMAGER INTERNAL REVENUE SERVICE, Petitioners,	No. 78 C 4449
v.	
FIRST STATE BANK OF CHICAGO, *Respondent.*	

AFFIDAVIT IN SUPPORT OF AMENDED RESPONSE TO PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

JACK SALKIN, being first duly sworn, on oath deposes and states that:

I am the person identified in the description of the records contained in the summons in dispute in the above-entitled case;

I have read the foregoing Amended Response to Petition to Enforce Internal Revenue Service Summons;

I know the contents thereof and that the responses, allegations and affirmative defenses contained therein are true to the best of my knowledge, information and belief.

Based upon my personal knowledge, information made available to me and those facts established through discovery in the above cause, I do verily believe the following to be true:

1. Since the formation of my wholly owned corporation, Advanced Textiles Company, Inc. and Jack Salkin Uniform Company, Inc., neither I nor said corporations have ever been audited by a revenue agent of the Internal Revenue Service.

2. In June of 1976, allegations of criminal violations of the Internal Revenue Code were made against me and/or my wholly owned corporations by an undisclosed informant to the Criminal Investigation Division of the Internal Revenue Service in Chicago, Illinois.

3. The informant's allegations were not made for the purpose of causing the Internal Revenue Service to make a civil tax determination or collect any outstanding taxes.

4. During the period from June of 1976 to December of 1977, several Special Agents of the Criminal Investigation Division of the Internal Revenue Service gathered information about me to be used in a criminal tax prosecution.

5. I am unable to describe in detail the information gathered because of the failure of the special agents who were deposed in the above cause to answer certain questions and produce certain documents, but the depositions disclose that several special agents worked on the case before it was assigned to Special Agent Joseph DeLeon.

6. On or about November 1, 1977, the Criminal Investigation Division's investigation of me received a docketed number.

7. On December 7, 1977, I was interviewed by Special Agent DeLeon and Special Agent Charles Accardi who asked me several questions until I refused to answer further at which time they served me with the two summonses involved in Civil No. 78 C 3195. No revenue agent accompanied Special Agents DeLeon and Accardi at that interview.

8. On December 7, 1977, Special Agents DeLeon and Accardi interviewed my accountant, Alvin Barasch, who was also served with an Internal Revenue Service Summons.

9. On or about January 10, 1978, my attorney delivered to Special Agent DeLeon my personal income tax file together with the income tax files of Advanced Textiles Company, Inc. and Jack Salkin Uniform Company, Inc.

10. Subsequently, Special Agent DeLeon accompanied by another special agent interviewed my bookkeeper, Mr. Arlis Smith, and several of my customers; they obtained affidavits from several persons whose identities they will not disclose and tape recorded the interview with Mr. Smith.

11. On February 8, 1978, Revenue Agent Kathleen O'Mullen was retroactively assigned to the investigation.

12. On May 23, 1978, Special Agent Robert W. Wermager served the summons in dispute on First State Bank of Chicago seeking my personal banking records. The bank was instructed not to comply with the summons.

13. At the time the summons in dispute was served, there was no institutional purpose on the part of the Internal Revenue Service to determine my civil tax liability or collect outstanding taxes.

14. The sole function of special agents of the Internal Revenue Service is to develop a case for criminal prosecution.

15. There were inordinate and unexplained delays in the Criminal Investigation Division's investigation of me, which commenced in June of 1976 or earlier, and these delays were occasioned by special agents who were seeking additional evidence to be used in a criminal tax prosecution.

16. A federal grand jury has been impaneled and has been and is presently conducting an investigation into the accounting firm that prepared my tax returns. The summons in dispute is being used among other things to gather information for other government agencies and departments.

17. The Criminal Investigation Division of the Internal Revenue Service has already obtained tax-related records concerning me and/or my wholly owned corporations; however, it is not clear whether the Internal Revenue Service has all of the records sought in the summons due to its failure to produce documents and the failure of witnesses to answer certain questions propounded to them on deposition.

18. The summons in dispute was issued based upon allegations made by an informant whose purpose in making such allegations is inextricably intertwined with the purpose of the present summons.

JACK SALKIN

SUBSCRIBED AND SWORN to before me
this 5th day of July, 1979.

NOTARY PUBLIC

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Amended Response to Petition to Enforce Internal Revenue Service Summons and Affidavit in Support thereof have been made upon the Untied States this _____ day of _____, 1979, by mailing a true copy of same to:

Linda A. Wawzenski, Esquire
Assistant U.S. Attorney
219 South Dearborn
Chicago, Illinois 60604

Michael von Mandel
Suite 1211
135 S. La Salle Street
Chicago, Illinois 60603

§7602. Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized —

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liabile for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

§7604. Enforcement of summons

(a) Jurisdiction of district court

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement

Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment

against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(c) Cross references

(1) Authority to issue orders, processes, and judgments

For authority of district courts generally to enforce the provisions of this title, see section 7402.

(2) Penalties

For penalties applicable to violation of section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), 7602, see section 7210.

§7609. Special procedures for third-party summonses

(a) Notice

(1) In General
If—

(A) any summons described in subsection (c) is served on any person who is a third-party recordkeeper, and

(B) the summons rquires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons,

then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but not later than the 14th day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain directions for staying compliance with the summons under subsection (b)(2).

(2) Sufficiency of notice

Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence or a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to

(b) Right to intervene; right to stay compliance

(1) Intervention

Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) Right to stay compliance

Not withstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to stay compliance with the summons if, not later than the 14th day after the day such notice is given in the manner provided in subsection (a)(2)—

(A) notice in writing is given to the person summoned not to comply with the summons, and

(B) a copy of such notice not to comply with the summons is mailed by register or certified mail to such person and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) Third-party recordkeeper defined

For purposes of this subsection, the term "third-party recordkeeper" means—

(A) any mutual savings bank, cooperative bank,

domestice building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501(c)(14)(A));

(B) any consumer reporting agency (as defined under section 603(d) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)));

(C) any person extending credit through the use of credit cards or similar devices;

(D) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)));

(E) any attorney; and

(F) any accountant.

(4) Exceptions

Paragraph (1) shall not apply to any summons—

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person,

(B) to determine whether or not records of the business transactions or affairs of an identified person have been made or kept, or

(C) described in subsection (f).

(5) Nature of summons

Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(B)) shall identify the taxpayer to whom the summons relates or the other person to whom the records pertain and shall provide such other information as will enable the person summoned to locate the records required under the summons.

* * *

Opposition

Office - Supreme Court, U.S.
FILED
FEB 25 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1272

In the Supreme Court of the United States

OCTOBER TERM, 1981

JACK SALKIN, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1272

JACK SALKIN, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

In this internal revenue summons enforcement case, petitioners seek review of the decision below enforcing several summonses seeking information relevant to a tax investigation of petitioner Jack Salkin.

The pertinent facts are undisputed and may be summarized as follows: As part of an investigation to determine petitioner's correct income tax liabilities, summonses were issued to petitioner, as president of his two wholly owned corporations, and to the First State Bank of Chicago, seeking information relevant to that investigation. Upon petitioner's refusal to comply with the two summonses and his direction to the bank that it likewise not comply (see 26 U.S.C. 7609), the government instituted these proceedings, subsequently consolidated, in the United States District Court for the Northern District of Illinois to compel compliance with the three summonses. In the moving papers

filed in the district court, the government made the requisite showing for enforcement of the summonses (Pet. App. A-17). In response, petitioner raised several affirmative defenses to the summonses and requested discovery.[1] The district court permitted petitioner to depose agents of the Internal Revenue Service, and the testimony on deposition amounted to more than 700 pages. Petitioner then moved to compel answers to certain questions that the deponents had refused to answer. The district court denied petitioner's motion and directed him to file an amended response to the enforcement petition, noting that disposal of the case by summary judgment might be appropriate (Order of Aug. 6, 1979). Petitioner thereupon filed an amended answer containing assertions of fact that were supported by an affidavit based upon his "information and belief" reading of the deposition transcripts (Pet. App. A-58 to A-74).

The district court denied the government's motion for summary judgment. It held that even though the government had established a prima facie case for enforcement, there remained a genuine issue of material fact for resolution because the government had not disproved petitioner's conclusory allegation that the Internal Revenue Service had abandoned the pursuit of a civil tax determination purpose (Dec. 6, 1979 Decision on Petitioner's Motion for Summary Judgment, at 1-2). The district court thereupon ordered an evidentiary hearing, at which the government announced that it would not produce further evidence because it had

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[1]The district court's order directing petitioner to show cause why the summonses should not be enforced required him to support by affidavit any allegations or defenses raised. The defenses raised by petitioner, however, were nothing more than conclusions of fact or law without any suggestion concerning what evidence might support those defenses. Indeed, the allegations were supported only by affidavit that the matters contained in the response were "true to the best of * * * [petitioner's] knowledge, information and belief" (Pet. App. A-62, A-72).

made a prima facie case for enforcement. The district court thereupon dismissed the government's enforcement petition under Fed. R. Civ. P. 41(b) (Pet. App. A-44).

The court of appeals reversed (Pet. App. A-1 to A-32). It held that to obtain enforcement of a summons, the government need only make the four-pronged showing required by *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964), and that a prima facie case for enforcement may be made by the issuing agent's affidavit which is normally attached to the petition (Pet. App. A-16). It further held that a party challenging a summons bears a heavy burden to adduce proof that the summons was issued for an improper purpose or otherwise ought not be enforced (Pet. App. A-20 to A-21). It therefore concluded that to obtain an evidentiary hearing a taxpayer must allege specific facts in response to the government's prima facie case from which the trial court might infer wrongful conduct on the part of the government. If no such facts are produced, "an evidentiary hearing would be a waste of judicial time and resources" (Pet. App. A-22 to A-24).

Here, the court of appeals concluded that (Pet. App. A-29 to A-30) the government established its prima facie case for enforcement and petitioner failed to rebut that showing. Although petitioner alleged that an institutional commitment had been made to prosecute him, he failed to prove, as required by *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), that a valid civil tax determination purpose had been abandoned by the Internal Revenue Service (Pet. App. A-29). Since petitioner's unsupported allegations were legally insufficient to defeat enforcement of the summonses and the discovery given him was "more than ample" to challenge the bona fides of the government's

case, the court of appeals ordered the summonses enforced (Pet. App. A-31).[2]

1. The decision below correctly ordered enforcement of the internal revenue summonses requiring production of various corporate books and records and bank records relating to a tax investigation of petitioner.

In *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964), the Court announced four requirements for the enforcement of the good faith issuance of an internal revenue summons. It stated: "[The Service] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed * * *." To enforce a summons under 26 U.S.C. 7602, the Court held in *Donaldson* v. *United States*, 400 U.S. 517, 536 (1971), that the summons must be issued before the Internal Revenue Service recommends to the Department of Justice the initiation of a criminal prosecution relating to the subject matter of the summons. As the Court subsequently explained in *United States* v. *LaSalle National Bank*, 437 U.S. 298, 311-313 (1978), the *Donaldson* rule is a prophylactic rule designed to protect the standards of criminal litigation discovery and the role of the grand jury as a principal tool of criminal accusation. In an elaboration of the *Donaldson* rule, the

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[2]The court of appeals (Pet. App. A-29) held that the district court erred in dismissing the government's action under Fed. R. Civ. P. 41(b), because the government had made its prima facie case and was therefore entitled to enforcement unless petitioner met his burden of proving that the Service had abandoned collection of the civil tax liabilities. The court also concluded that summary judgment for petitioner was inappropriate in this case because the burden of proof imposed on a party challenging a summons is far more stringent than the showing that is necessary to defeat a motion for summary judgment, *viz.*, that there is a genuine issue of material fact.

Court further held in *LaSalle National Bank* that the good-faith use of a summons requires that the Service not abandon its institutional responsibility to determine and to collect taxes and civil fraud penalties. That a single special agent intends only to gather evidence for a criminal investigation is not dispositive of the good faith of the Internal Revenue Service as an institution. "[T]hose opposing enforcement of a summons * * * bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service" (437 U.S. at 316).

Petitioner does not dispute the foregoing principles. Rather, he asserts (Pet. 11-13) that the court of appeals erred in denying him the right to examine government witnesses at a hearing in order to explore the institutional commitment of the Service, and that the decision below therefore conflicts with *United States* v. *Southeast First National Bank*, 655 F. 2d 661, 667-668 (5th Cir. 1981). There is, however, no conflict. The courts of appeals are in agreement that individuals opposing a summons must be given an opportunity to meet the heavy burden of disproving the actual existence of a valid civil tax determination or collection purpose by the Service. Compare *United States* v. *Genser*, (*Genser II*) 595 F. 2d 146, 152 (3d Cir.), cert. denied, 444 U.S. 928 (1979), with *United States* v. *Southeast First National Bank*, *supra*, 655 F. 2d at 667-668; *United States* v. *Security Bank & Trust Co.*, 661 F. 2d 847, 850-853 (10th Cir. 1981). The only difference among the courts relates to the precise procedure to be followed in a summons enforcement proceeding. Some courts, including the court below, have held that the person opposing the summons can elicit this information through discovery (see *Genser II* and *United States* v. *Garden State National Bank*, 607 F. 2d 61, 68-70 (3d Cir. 1979)). Others have concluded that the information may be elicited by the examination of government witnesses at a hearing (see, *e.g.*,

Southeast First National Bank, supra). But the divergence in procedure does not constitute a conflict. Indeed, the two procedures have been recognized by the Fifth Circuit itself to be " 'substantial[l]y equivalent.' " *United States* v. *Daffin*, 653 F. 2d 121, 124 (4th Cir. 1981), quoting *United States* v. *Harris*, 628 F. 2d 875, 883 (5th Cir. 1980). See also the discussion in *Harris, supra*, at 880-884.

At all events, petitioner does not allege that he would prevail under the rule of any other circuit nor has he been denied information to which some other court of appeals would rule he has a right. Indeed, the Fifth Circuit provides only "a limited adversary hearing where the taxpayer may question IRS officials concerning the Service's reasons for issuing the summons" *United States* v. *Southeast First National Bank, supra*, 655 F. 2d at 667 (footnote omitted). Here, the extensive testimony elicited on deposition was as much, if not more, than petitioner could have obtained at such a hearing. *United States* v. *Daffin, supra; United States* v. *Salter*, 432 F. 2d 697, 700 (1st Cir. 1970). There is accordingly no basis for petitioner's claim that he is entitled to a further hearing.

2. Petitioner further contends (Pet. 5-11) that, at the very least, he was entitled to a remand for a hearing at which he could "put on his case." His argument rests on the erroneous assumption that there was no evidence before the court to support the government's case for enforcement and ignores the testimony recorded on more than 700 pages of deposition transcript and the finding by the district court (Pet. App. A-7) that the government had made out its prima facie case for enforcement. Indeed, after reviewing the record in this case, the court of appeals concluded (Pet. App. A-17) that petitioner's contentions that the requirements of *Powell* and *LaSalle National Bank* had not been met "are without merit" and that petitioner had been given "more than ample opportunity to try to develop a defense

that could meet the stringent standards of *LaSalle* * * * [and was] simply unable to do so" (Pet. App. A-29).

Petitioner therefore errs in arguing (Pet. 6-9) that the court of appeals denied him due process in ordering the summonses enforced without further hearing.[3] By means of extensive deposition procedure petitioner was given a full opportunity to obtain the information needed to present all his claims. An additional evidentiary hearing to examine the same agents would have produced no other pertinent evidence. Accordingly, petitioner was not deprived of due process, and the court of appeals' enforcement of the summonses without remand for further proceedings was amply justified. In these circumstances, "[a] remand for further proceedings at the trial level would stultify the enforcement of the federal tax laws." *United States* v. *Hodgson*, 492 F. 2d 1175, 1178 (10th Cir. 1974).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1982

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[3]The facts upon which petitioner relies as raising a question of the bona fides of the government's purpose in issuing the summonses (Pet. 7) are insufficient to defeat enforcement of the summonses. The fact that the investigation is criminal in nature is insufficient to defeat enforcement of the summonses as a matter of law. *United States* v. *LaSalle National Bank*, *supra*, 437 U.S. at 316. The unsupported allegations of inordinate delays and use of the "[c]onclusory allegations carefully tailored to the language of *Powell* [and *LaSalle*]" are likewise insufficient to preclude enforcement or even to bring into question the good faith of the government in issuing the summonses. *United States* v. *Church of Scientology of California*, 520 F. 2d 818, 824 (9th Cir. 1975); *United States* v. *Garden State National Bank*, *supra*, 607 F. 2d at 68-70.

Petitioner's Reply Brief

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No. 81-1272

IN THE

Supreme Court of the United States

October Term, 1981

JACK SALKIN, President, ADVANCED TEXTILES COMPANY, INC., and JACK SALKIN, President, JACK SALKIN UNIFORM COMPANY, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA and Special Agent JOSEPH A. DE LEON, Internal Revenue Service,

Respondents.

JACK SALKIN,

Petitioner,

v.

UNITED STATES OF AMERICA and Special Agent DONALD OLSEN, Internal Revenue Service,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION

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INTRODUCTION

The Questions Presented, Opinions Below, Jurisdiction, Statutory Provisions and Statement of the Case have previously been set forth in the petition for a writ of certiorari.

Pursuant to Rule 22.5 of the Supreme Court Rules of Practice, Petitioners herewith submit this reply to the Memorandum for the Respondents in Opposition.

ARGUMENT

Respondents contend that a "divergence in procedure" does not constitute a conflict among the circuits and that Petitioners have not been deprived of their right to put on their case on the ground that deposition testimony is an adequate substitute for a hearing at which the taxpayer must carry the burden of showing an improper use of the summons. Respondents rely on the purported "extensive testimony" contained in "more than 700 pages of deposition transcript...", on the Court of Appeals' alleged review of this "record", and on a finding by the District Court that the government had made out its prima facie case. Memorandum for the Respondents in Opposition at 6.

Respondents' contentions are fatally flawed. First, the Court of Appeals did not base its holding on the adequacy of this "extensive" deposition testimony, but on the mistaken belief that Petitioners herein had been provided a hearing. The Court stated that:

> [The taxpayers] were all given hearings at which they were able to ascertain virtually all of the information that they had sought to discover. This questioning included the basic prehearing discovery that we have permitted. (A.-29)

In fact, it is indisputable that Petitioners herein were not given a hearing. The District Court considered a hearing unnecessary in view of its disposition of the case pursuant to Rule 41(b). That disposition was consistent with the District Court's previous finding, in connection with the denial of cross motions for summary judgment,

that a prima facie case had been made. (A.-55) The District Court, consistent with rules subsequently established by the Court of Appeals, (A.-24) directed the government to move its prima facie case into evidence at the commencement of the hearing. (A.-37, 54-55), The government refused to do so, leaving the District Court "no alternative but to grant the motion of both the respondents and the intervenors for judgment under Rule 41(b)." (A.-39) The government, having made that choice, must be bound by the consequences thereof. *United States v. Munsingwear,* 340 U.S. 36 (1950).

Finally, the discovery obtained by Petitioners herein illustrates the total lack of merit in Respondents' argument that deposition testimony is an adequate substitute for a hearing and its conclusion that there is accordingly no conflict among the circuits. The government agents refused to bring any documents to the depositions. The government agents stated that they did not possess the necessary information to answer at least 17 questions, although they acknowledged that the information was contained in the documents which they had refused to produce. Under the instruction of government counsel, the agents refused to answer some 76 additional questions.

Examples of the questions that the agents refused to answer were when the investigation began[1] and the

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[1]With respect to when the investigation began, Robert Wermager, former Special Agent of the IRS testified at his deposition:

Q. You won't tell us when the case was initiated in terms of gathering information?

A. Correct.

United States v. Salkin, No. 78C 3195 and 78C 4449, Deposition of Robert Wermager (N.D. Ill. May 25, 1979) at 158.

identities of the investigating agents.[2] These of course are questions that appear on the limited list of seven questions with respect to which even the Seventh Circuit will permit discovery. (A.-22) Moreover, among the 76 questions which the government refused to answer were questions which illustrate the fact that limiting examination to a pre-ordained series of questions conflicts with the directive of this Court in *United States v. La Salle National Bank*, 437 U.S. 298, 318 n. 20 (1978) that "[f]uture cases may well reveal the need to prevent other forms of agency abuse ...." In *La Salle*, the Court stated that it would "not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution." *Id.* at 317. The Seventh Circuit's questions inquire only into the dates upon which certain formal actions were taken. Yet the agents involved in the instant investigation refused to explain why a delay of more than a year and one-half occurred between the time the investigation began and the date the summonses were served.[3]

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[2]Mr. Wermager also refused to identify other agents involved in the investigation:

Q. Okay. Can you tell us in this case whether there was a referral from a revenue agent?

A. No, I won't. I choose not to answer that question.

Id. at 164.

[3]Special Agent Wermager's deposition testimony is again instructive:

Q. ...can you tell us why there was such a delay, a year and a half from the institution of the investigation, until the summons was served?

A. I don't believe I can answer that question right now.

Q. Okay. Fine. Is this — you just don't have the knowledge, is that it?

A. No. I have the knowledge.

Q. You have the knowledge, but you refuse to testify at this time as to why there was such an unexplained delay?

A. That's correct.

United States v. Salkin, No. 78C 3195 and 78C 4449, Deposition of Robert Wermager (N.D. Ill. May 2, 1979) at 112.

It is clear that, at a hearing, inquiry into the purpose of the summons could not be similarly frustrated. Indeed, it may have been due to a desire to avoid this prospect that the government refused to put its prima facie case into evidence. The District Court made it clear that it would permit Petitioners to examine "key witnesses, who would know something about the facts of the case" at the hearing. (A.-52) Indeed, this would have been consistent with the Seventh Circuit's subsequent ruling that, at a hearing the "taxpayer would also be able to examine under oath the agents responsible for the investigation and any other witnesses he may call." (A.-24) However, contrary to the Seventh Circuit's statement that all the taxpayers in the four cases reviewed by it were provided hearings, Petitioners herein never had a hearing because the District Court granted their Rule 41(b) motion. At such a hearing, Petitioners would have been able to compel the withheld information. For the Respondents to now argue that the Petitioners have had their day in court, on the basis of inadequate deposition testimony, is contrary to the Court's decisions in *Byrd v. Blue Ridge Rural Electric Cooperative,* 356 U.S. 525, 533 (1958) and *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 156 (1963).

CONCLUSION

For the foregoing reasons and for those contained in the Petition for Writ of Certiorari, the Seventh Circuit's decision should be summarily reversed or, at the very least, the cases should be remanded for a hearing at which the Petitioners can put on their case.

Respectfully submitted,

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